Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term 1994

In the Matter of DORIS L. SASSOWER,

Petitioner,

-against-

HON. GUY MANGANO, as Presiding Justice of the Appellate Division, Second Dept., HON. MAX GALFUNT, as Special Referee, and EDWARD SUMBER and GARY CASELLA, as Chairman and Chief Counsel, respectively of the Grievance Committee for the Ninth Judicial District,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of the State of New York
Appellate Division, Second Judicial Department

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether New York's attorney disciplinary law is unconstitutional, as written and as applied:

1. where an attorney can be immediately, indefinitely, and unconditionally suspended from the practice of law by an interim order, without findings, reasons, notice of charges, a pre-suspension hearing, or a post-suspension hearing for nearly four years;

2. where a disciplined attorney has no absolute right of judicial review, either by direct appeal or by the codified common law writs;

3. where adjudicative and prosecutorial functions are wholly under the control of the courts, enabling them to retaliate against attorneys who are judicial whistle-blowers;

4. where disciplinary proceedings: (a) do not comply with the court's own disciplinary rules; (b) are commenced by *ex parte* applications, without notice or opportunity to be heard ; (c) deny the accused attorney all discovery rights, including access to the very documents on which the proceedings purport to be based; (d) do not rest on sworn complaints; (e) do not rest on an accusatory instrument or are asserted "on information and belief", not based on any probable cause finding of guilt.

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New York's Code of Professional Responsibility:
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Hazard, *"A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings"*, 96 Yale L.J. 1060 (April 1987)

Petitioner, Doris L. Sassower, respectfully petitions for a writ of certiorari to review the Decision, Order & Judgment of the Appellate Division, Second Department of the Supreme Court of the State of New York, which became final upon the Order of the New York Court of Appeals denying leave to appeal.

OPINIONS BELOW

There are no opinions below. The Decision, Order & Judgment of the Appellate Division, Second Department [hereinafter "Judgment"] is reported at 196 A.D.2d 843 (1993) and appears at A-20. The Order of the New York Court of Appeals, denying Petitioner's appeal as of right, is reported at 83 N.Y.2d 904 (1994) and appears at A-22. That Court's Order, denying leave to appeal, is reported at 84 N.Y.2d 863 (1994) and appears at A-23.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). The Order of the New York Court of Appeals denying leave to appeal, dated September 29, 1994, is a final order of New York's highest state court. Justice Ruth Bader Ginsberg granted Petitioner's timely motion to extend her time to seek certiorari to February 27, 1995.

CONSTITUTIONAL, STATUTORY, COURT RULE AND ETHICAL CODE PROVISIONS INVOLVED

The constitutional, statutory, court rule, and ethical code provisions relied upon by Petitioner are the First, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article 1, §§1, 6, 8, and 11, Article VI, §§3(7), 20b(4) and 28c of the New York State Constitution; Judiciary Law §§ 14, 90(2), 90(6), 90(8), 90(10); CPLR §§7801, 7803, 7804, 408, 506(b), 3025(b) and 3211 (a)(7), (c), (d), and (e); Appellate Division, Second

Department Rules Governing the Conduct of Attorneys, 22 NYCRR §§691.4, 691.13(b)(1), and (c)(1); Rules Governing Judicial Conduct §100.3(c); and Code of Judicial Conduct, Canon 3(C); Code of Professional Responsibility, Canons 1, 8; Model Rules of Professional Conduct, Preamble, Rule 8.3.

STATEMENT OF THE CASE

This appeal arises out of a special proceeding for a writ of prohibition and other relief brought under Article 78 of New York's Civil Practice Law and Rules [A-13]. This proceeding charged Respondent Appellate Division, Second Department [hereinafter "Respondent Second Department"] its appointed Referee, its appointed Grievance Committee Chairman, and its appointed Chief Counsel, with using the disciplinary mechanism for retaliatory purposes against Petitioner, an attorney, by conduct knowingly and deliberately without jurisdiction and in disregard of controlling law and Petitioner's constitutional rights.

Under applicable venue provisions [A-11], Petitioner was obliged to bring her Article 78 proceeding against Respondent Second Department in the Appellate Division, Second Department. Respondent Second Department refused to address Petitioner's claims that it was disqualified from adjudicating the proceeding and granted the motion of its own attorney, the Attorney General of the State of New York, dismissing the case against itself.

The federal questions were timely and properly raised as hereinafter set forth. The Article 78 petition alleges constitutional infirmity, *inter alia*, that Petitioner was provided no notice or hearing prior to the commencement of disciplinary proceedings against her and was, thereby, denied due process and equal protection of the laws. Petitioner's cross-motion raised additional due process and equal protection bases, particularly as they relate to her interim suspension and the denial of judicial review, the necessity for the court to recuse itself, conflation of

the prosecutorial and adjudicatory functions in the disciplinary procedure, and retaliatory and abusive motivation. The aforesaid issues were raised on appeal to the New York Court of Appeals [hereinafter "Court of Appeals"], with a direct challenge to the constitutionality of Judiciary Law §90 and the Article 78 statute and venue provisions. The Court of Appeals denied review.

A. Petitioner's Suspension From the Practice of Law And Procedural Background.

The background to the disciplinary proceedings against Petitioner leading up to the subject Article 78 proceeding was fully developed in the record before the Court of Appeals. Until her interim suspension by Respondent Second Department's June 14, 1991 order [A-24], Petitioner was recognized as a highly distinguished New York attorney [A-26]. Admitted to the New York bar in 1955 and to this Court in 1961, she became nationally known as a human rights activist, a pioneer of the women's movement, and a leader of divorce reform. A former president of the New York Women's Bar Association, Petitioner had long been active in efforts to improve the quality of the judiciary. She was nominated as a candidate for the New York Court of Appeals in 1972. From that year until 1980, Petitioner served on the New York State Bar Association Judicial Selection Committee, interviewing every candidate for the Court of Appeals, the Appellate Divisions, and the Court of Claims.

In 1989, Petitioner spoke out publicly against the increasing politicization of New York's courts . In 1990, as *pro bono* counsel, she brought an Election Law proceeding, *Castracan v. Colavita, et al.*[1], challenging as illegal, unethical, and

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[1] Anthony Colavita was a former Chairman of the New York State Republican party and, since 1979, Chairman of the Republican party in Westchester County, New York. Sued with him were other high-ranking leaders of the Westchester Republican County Committee, as well as their Democratic counterparts.

unconstitutional a 1989 written deal [A-29] between the two major parties. In that deal, the parties agreed to cross-endorse the same judicial nominees in seven judicial races over a three-year period, with contracted for resignations to create vacancies, and a split of judicial patronage. *Castracan* also challenged, as violative of New York's Election Law, the judicial nominating conventions which had implemented the cross-endorsement deal.

On October 18, 1990, the day before Petitioner was scheduled to argue an appeal from the lower court dismissal of *Castracan* before the Appellate Division, Third Department, that Court, without reasons, cancelled the scheduled argument -- putting the case over until after the November elections. On that same day, Respondent Second Department issued an order directing Petitioner to be medically examined by a physician selected by the Grievance Committee's Chief Counsel [A-31]. Such order was challenged by Petitioner's counsel as unlawful on numerous grounds in a motion to vacate, who also submitted it in opposition to a motion by the Grievance Committee's Chief Counsel to suspend Petitioner for her alleged failure to comply with the order.

Following Petitioner's public announcement that she would be appealing *Castracan* to the Court of Appeals, after an affirmance by the Third Department, Petitioner was served with Respondent Second Department's June 12, 1991 order denying her vacate motion [A-33], together with a June 14, 1991 interim order, suspending her immediately, indefinitely, and unconditionally [A-24][2]. Neither order made any findings or stated any reasons. The suspension order was not preceded by any notice of charges or hearing, nor was it related to any pending disciplinary proceeding.

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[2] Petitioner immediately moved for vacatur or modification of the suspension order, stating that the order was "swift retribution" for exercise of her First Amendment rights and "a constitutional deprivation of due process, more draconian and less justified than existed in *Bell v. Burson*, 402 U.S. 371 (1971) -- where only a license to drive was involved." Respondent Second Department denied that motion, without reasons [A-35].

The Court of Appeals denied review of Petitioner's interim suspension [A-36], as well as *Castracan*, both appeals coming before it in the summer of 1991.

On October 24, 1991, Petitioner wrote a widely-circulated letter to the Governor of New York, calling for appointment of a Special Prosecutor to review the files in *Castracan* and her suspension to authenticate her allegations as to political manipulation of judgeships in the Ninth Judicial District of New York, the complicity of the courts, including the New York State Court of Appeals, and the retaliation against her[3] .

The record before the Court of Appeals when, without reasons, it denied review [A-36] of Petitioner's findingless interim suspension order showed that there was no legal or factual basis for her suspension and that it was the product of fraud and collusion[4]. In prior cases involving interim suspension orders of attorneys, the Court of Appeals had granted review, *Matter of Nuey*, 61 N.Y.2d 513, 474 N.Y.S.2d 714 (1984); *Matter of Padilla and Gray*, 67 N.Y.2d 434, 503 N.Y.S.2d 548 (1986). As to the interim suspension order in *Nuey*, the Court had vacated it for lack of findings.

A few months later, the Court of Appeals granted leave to appeal to another attorney suspended under a findingless interim order by Respondent Second Department, *Matter of Russakoff*, 72 N.Y2d 520 (1992). In May 1992, the Court of Appeals, as in *Nuey*, vacated the subject attorney's interim suspension order for.

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[3] A copy of that letter was also sent to the Court of Appeals and, in 1993, was part of Petitioner's testimony at public hearings of the New York State Senate Judiciary Committee in opposition to confirmation of two gubernatorial nominees to the Court of Appeals, Justices Howard Levine and Carmen Ciparick, now sitting on that Court. Petitioner's opposition to their nominations was based on the role they played in protecting the judges and political leaders implicated in the *Castracan* case. Those two judges recused themselves from adjudicating the subject proceeding [A-22, A-23].

[4] Such fraud allegations by Petitioner were repeatedly detailed by her in this Article 78 proceeding, and were uncontroverted by Respondents. Pertinent portions of Petitioner's factual Chronology, which she submitted to the Court of Appeals, are annexed hereto at A-37-44 .

lack of findings, further observing that the Second Department's disciplinary rules warranted amendment so as to provide a prompt post-suspension hearing, citing *Barry v. Barchi*, 443 U.S. 55 (1979) and *Gershenfeld v. Justices of the Supreme Court*, 641 F.Supp. 1419 (E.D. Pa 1986).

Petitioner then moved before Respondent Second Department to vacate her findingless interim suspension order based on *Russakoff* , as well as on grounds of fraud. Without reasons, Respondent Second Department denied her motion, with costs[5], also denying leave to appeal to the Court of Appeals [A-45].

Petitioner then appealed to the Court of Appeals, documenting her contention that her right to review of her findingless interim suspension order was in every respect *a fortiori* to that of attorney *Russakoff*, that she had still had no post-suspension hearing, and that the disciplinary rules of Respondent Second Department [A-7-8] had still not been amended to require any hearing. Nevertheless, the Court of Appeals denied review, dismissing her appeal "for lack of finality" by order dated November 18, 1992 [A-49].

Notwithstanding that Petitioner was already suspended, with no hearing ever having been afforded her as to its basis, Respondent Second Department authorized, by *ex parte* orders [A-50, A-53, A-55, A-57], new disciplinary proceedings to be brought against her, based entirely on the Grievance Committee's

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[5] Respondent Second Department, thereafter, *sua sponte*, amended its order to impose maximum costs [A-46], following which Petitioner moved for reargument, showing, by documentary comparison to 20 other attorneys then under interim suspension by Respondent Second Department, that her suspension was unprecedented. Petitioner also sought, alternatively, certification to the Court of Appeals of the question as to *Russakoff*'s applicability to her case. Respondent Second Department denied all relief, again imposing against her maximum costs [A-47].

own *sua sponte* complaints and without compliance with any of the due process requirements of the court's own published disciplinary rules as to, *inter alia*, written charges, a pre-petition hearing, and probable cause findings based thereon, 22 NYCRR §691.4 [A-4][6]. It also, and without reasons, overrode, by *ex parte* order [A-59], a unanimous vote of the Grievance Committee to hold in abeyance the prosecution of a prior unrelated disciplinary proceeding based on a February 6, 1990 disciplinary petition, and directed the Grievance Committee to proceed with prosecution. As to the February 6, 1990 disciplinary petition, there, likewise, had been no compliance with the due process requirements of the court's own disciplinary rules including, *inter alia*, the requirements of written charges, a pre-petition hearing and probable cause findings based thereon, §691.4(e)(4) [A-4].

In February 1993, Respondent Second Department communicated, *ex parte* [A-61], with Respondent Referee Galfunt, who had been appointed by its *ex parte* order to hear and report on the February 6, 1990 petition [A-62], and directed him to proceed to hear same forthwith. Thereafter, at the April 1993 pre-hearing conferences on the February 6, 1990 disciplinary petition, Respondent Galfunt refused to rule on Petitioner's jurisdictional and constitutional objections, albeit Petitioner's March 7, 1990 Verified Answer had placed jurisdiction in issue and had raised, as her Second Complete Defense, that she was "being made the subject of invidious discriminatory, retaliatory, selective disciplinary action, denying her, *inter alia*, equal protection of the laws."

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[6] In fact, the first such post-suspension disciplinary proceeding so authorized [A-50] was not even based on any report of the Grievance Committee. After Petitioner obtained unassailable proof that there was no committee report [A-52], which proof she annexed to a vacate motion, Respondent Second Department then vacated its original *sua sponte* order, granting leave to the Grieviance Committee, which it had never requested, to "resubmit the charges" [A-53].

B. Procedural History of the Article 78 Proceeding

1. *In the Appellate Division, Second Department.*

On April 28, 1993, Petitioner commenced this Article 78 proceeding in the Appellate Division, Second Department, charging Respondent Second Department with violating her "constitutional rights of due process and equal protection" by its authorization of the February 6, 1990 disciplinary petition [A-63], where none of the jurisdictional and constitutional requirements of §691.4(e)(4) [A-5] had been met. Petitioner further pointed out that the February 6, 1990 disciplinary petition did not plead that the Grievance Committee was proceeding under §691.4(e)(5) [A-6] or show any facts to support a claim of exigency thereunder].

Petitioner alleged that she had "no adequate remedy" in the disciplinary proceeding and requested transfer to another Judicial Department.

New York's Attorney General, on behalf of all Respondents, moved to dismiss the Article 78 petition for failure to state a cause of action. He conceded that the requirements of §691.4(e)(4) had not been met prior to Respondent Second Department's authorization of the February 6, 1990 disciplinary petition. He defended such non-compliance by claiming that the order directing prosecution was based on a "confidential" Grievance Committee report which he contended had "implicitly" relied on §691.4(e)(5). The Attorney General did not annex a copy of the report, did not allege that he had read it or was familiar with it, and submitted no affidavits of his clients. He opposed transfer and claimed that there was an adequate remedy in the underlying disciplinary proceeding.

Petitioner cross-moved for production of the committee

report, which the Attorney General had placed in issue. She denied and documentarily showed facts belying any claim that §691.4(e)(5) had been relied on, "implicitly" or otherwise. Citing the record in the underlying disciplinary proceedings, Petitioner detailed that she had no remedy therein because Respondent Second Department was simply not following the law.

Petitioner's cross-motion raised as a "threshold issue" the propriety of Respondent Second Department sitting as "judge of its own cause" and sought leave to amend or supplement her Article 78 Petition "so as to plead a pattern and course of harassing and abusive conduct by Respondents, acting without or in excess of jurisdiction...." Petitioner identified, as part of that pattern, her interim suspension, procured without notice of charges, hearing, or related underlying disciplinary proceeding, as well as the two *post-suspension* disciplinary proceedings which Respondent Second Department had authorized against her. Both such proceedings were commenced, like the February 6, 1990 disciplinary petition, by *ex parte* order [A-50, A-55 , A-57] and without compliance with the due process pre-petition requirements of the court rules and the Constitution [A-5].

As to the post-suspension disciplinary petitions, Petitioner, likewise, sought discovery of the *ex parte* Grievance Committee reports on which they were allegedly based. She argued that there could be no possible basis for the Committee's dispensing with the pre-petition notice and hearing requirements of §691.4(e)(4) since she had long before been suspended and §691.4(e)(5) was plainly inapplicable.

Petitioner additionally cross-moved for summary judgment.

Petitioner's factual allegations and documentation in opposition to the Attorney General's dismissal motion and in support of her cross-motion were entirely uncontroverted by the Attorney General in his reply. Again, he failed to come forth with a rebuttal affidavit from his clients or other proof to establish any reliance by the Grievance Committee on §691.4(e)(5) [A-6] or that there was an adequate remedy in the underlying disciplinary

proceeding. He opposed discovery of the *ex parte* committee reports, which he claimed were protected from disclosure by the confidentiality afforded attorney disciplinary proceedings under Judiciary Law §90(10) [A-10] and opposed transfer.

Petitioner then argued that denial of access to the *ex parte* committee reports on which the disciplinary prosecutions against her were allegedly based was a " violation of [her] fundamental federal and state due process rights." Moreover, she contended she was entitled to summary judgment in her favor, as a matter of law, since there was "no triable issue," Respondents having failed to come forward with "any sworn statement in rebuttal, based on their personal knowledge of the facts".

2. ***Respondent Second Department's Judgment***

Respondent Second Department rendered a Judgment [A-20] by a five-judge panel, three of whose members had themselves participated in *every* order in the underlying disciplinary proceeding which Petitioner's Article 78 proceeding had sought to have reviewed, and a fourth judge who had participated in more than half the challenged orders [cf. A-24, A-32, A-33, A-34, A-35, A-45, A-46, A-47, A-49, A-50, A-53, A-55, A-57, A-59, A-61, A-63].

By that Judgment [A-20], Respondent Second Department granted the dismissal motion of its own attorney, the Attorney General, with a bill of costs against Petitioner. In dismissing the Article 78 proceeding against itself, "on the merits", Respondent Second Department stated that "petitioner's jurisdictional challenge can be addressed in the underlying disciplinary proceeding."

3. ***Respondents' Post-Judgment Actions.***

Pursuant to Respondent Second Department's Judgment, Petitioner thereafter sought to renew her jurisdictional objections in the underlying disciplinary proceedings.

Nevertheless, at the hearings on the February 6, 1990 petition, Respondent Referee Galfunt maintained his refusal to rule on Petitioner's jurisdictional and constitutional objections, refusing to allow any proof thereon[7]. Petitioner thereafter presented such fact to Respondent Second Department as part of a dismissal/summary judgment motion, directed to all three disciplinary petitions against her. The motion claimed violation by Respondents of "Fourteenth Amendment federal constitutional guarantees of due process and equal protection and the counterpart provisions thereof in Article I, §6 and §11 of the New York State Constitution."

Notwithstanding that Petitioner's motion was fully documented and was entirely uncontroverted by any probative evidence, Respondent Second Department, by its order dated January 28, 1994 [A-87] not only denied same, but threatened Petitioner with criminal contempt[8].

The foregoing supervening acts were made part of the record before the Court of Appeals, together with a full set of the transcripts of the hearings on the February 6, 1990 disciplinary petition and all of the post-Judgment motion papers.

4. *In the New York Court of Appeals*

Petitioner appealed to the Court of Appeals, contending in her Jurisdictional Statement that "there is directly involved the

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[7] The appalling obstruction of all interrogation by Petitioner directed to establishing the lack of jurisdiction is reflected by the appended excerpts from the hearing transcripts [A-64-86]. They must be read to be believed since it is otherwise impossible to gauge the extent of the travesty occurring in a "quasi-criminal" disciplinary proceeding in New York.

[8] Said order was rendered by a panel consisting of Presiding Justice Guy Mangano, the first named respondent in Petitioner's Article 78 proceeding, and the same four judges of Respondent Second Department who had dismissed that proceeding, albeit disqualified from doing so.

construction of state and federal Constitutions -- in this case, the Fourteenth Amendment of the Constitution of the United States and Article 1, §6 and §11 of the Constitution of the State of New York, relating to due process and equal protection in the context of disciplinary jurisdiction exercised under Judiciary Law §90" [A-9].

Petitioner argued that she had been denied a fair and impartial tribunal. She contended that Respondent Second Department's refusal to recuse itself from the Article 78 proceeding to which it was a party was unconstitutional and a wilful subversion of the historic purpose behind the common law writs.

Petitioner also stated that the record in the underlying disciplinary proceedings reflected the same bias and lawlessness as was reflected in the Judgment [A-20] and that the record in the Article 78 proceeding entitled her, not the Respondents, to summary judgment.

The Attorney General made no challenge to Petitioner's legal authorities and did not deny that the five-judge Second Department panel which had dismissed the Article 78 proceeding included four judges accused of the official misconduct which was the subject of the proceeding.

Petitioner responded by showing that Judiciary Law §90 was being used to retaliate against lawyers who spoke out against judicial abuses She contended that such violation of First Amendment rights resulted from the Court's complete control of the disciplinary mechanism and its misuse of the confidentiality provision of Judiciary Law §90(10) [A-10] to conceal retaliatory, invidious and selective prosecution[9].

Petitioner also challenged the constitutionality of the Article 78 statute, which, when construed with the venue provisions of CPLR §506(b)(1) [A-11], required proceedings against Appellate Division judges to be brought in the Judicial

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[9] A substantial portion of Petitioner's constitutional arguments, as presented to the Court of Appeals, is appended hereto at A-89.

Department of those very judges.

By Order dated May 12, 1994 [A- 22], the Court of Appeals dismissed Petitioner's appeal from Respondent Second Department's Judgment [A-20] upon the ground that "no substantial constitutional question is directly involved."

Thereafter, Petitioner moved for reargument, reconsideration, and for leave to appeal. She pointed out that the Attorney General had not met his affirmative duty "to opine that its statutes are constitutional whenever they are impugned (Executive Law §71, see also, CPLR §1012(b))" stating, "[i]n view of such affirmative duty, the Attorney General's conspicuous failure...to defend the constitutionality of the Article 78 statute, as well as Judiciary Law §90 and the Appellate Division's disciplinary rules, all...challenged, as written and as applied, must be taken as his concession of the unconstitutionality thereof."

Nonetheless, the New York Court of Appeals, by order dated September 29, 1994 [A-23], again without opinion, adhered to its prior denial of appeal as of right and denied leave to appeal, and all other relief. It is for that reason that Petitioner here seeks the intervention of this Court.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the courts of New York have decided important questions of federal law in ways which conflict with applicable decisions of this Court on fundamental due process issues and, to the extent the federal law has not been settled, it ought to be settled by this Court.

The lead case raising the issue of the constitutionality of New York's attorney disciplinary statute is *Mildner v. Gulotta*, 405 F.Supp. 182, 191 (E.D.N.Y. 1975), aff'd, 425 U.S. 901 (1976). *Mildner* was a consolidation of three separate cases under 42 U.S.C. §1983 brought by three disciplined New York attorneys. All were challenging the constitutionality of Judiciary Law §90 [A-9] after the New York Court of Appeals denied them review.

The majority of a three-judge District Court held that standards of federalism and comity required the federal court to abstain because the plaintiffs made no allegations of bias in the underlying disciplinary proceedings. Judge Jack Weinstein, in dissent, reached the merits and would have held Judiciary Law §90 unconstitutional in numerous respects, on due process, as well as on equal protection grounds.

This Court affirmed *Mildner*, without opinion, on the issue of abstention -- never reaching the transcendent issues as to the constitutionality of Judiciary Law §90. Yet, Justices Marshall and Powell apparently agreed with the view of concurring Judge Moore of the District Court that "the constitutional question is of sufficient importance to be resolved by our highest court..." (at 199). This Court's Memorandum Decision in *Mildner* shows that those two justices wished to "postpone consideration of the question of jurisdiction to a hearing of the case on the merits." 425 U.S.901 (1976).

The irreconcilable schism in the *Mildner* three-judge court as to the constitutionality of Judiciary Law §90 is a reflection of the differing understandings as to what this Court meant when, in *In re Ruffalo*, 390 U.S. 544, 551 (1968), it recognized attorney disciplinary proceedings as "quasi-criminal". Judge Neaher's majority opinion in *Mildner* conceded that the term was less than clear, referring to the designation as "cryptic", at 191. He then went on to cite (at 191-2) the Seventh Circuit as holding that disciplinary proceedings are "in the nature of an inquest...not for the purpose of punishment." *In re Ming*, 469 F.2d 1352, 1353 (7th Cir. 1972). Starting from such perspective, it is not surprising that the two-judge majority arrived at a different conclusion from that of Judge Weinstein, who took the view expressed in *Erdman v. Stevens*, 458 F.2d 1205, 1209-10 (2d Cir) *cert. denied*, 401 U.S. 889 (1972), that "*a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding*...[I]t cannot be disputed that for most attorneys the license to practice law represents their

livelihood, loss of which may be a greater punishment than a monetary fine [citing cases of this Court]...Furthermore, disciplinary measures against an attorney...threaten another serious punishment -- loss of professional reputation. The stigma of such a loss can harm the lawyer in his community...". *Mildner*, at 210-211 (emphasis in the original). Consequently, Judge Weinstein believed that due process in the context of attorney disciplinary proceedings requires the full range of due process rights.

This divergence of understanding on such a pivotal issue as to what process is due an attorneys in "quasi-criminal" disciplinary proceeding has continued unabated in the two decades since *Mildner*, where the federal courts, in reviewing state disciplinary proceedings in civil rights actions, have not settled that issue or evolved standards that are consistent. *See* generally, Brewer, "*Due Process In Lawyer Disciplinary Cases: From the Cradle to the Grave,*" 42 South Carolina L.Rev. 925 (Summer 1991), and Hazard, *"A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings"*, 96 Yale L.J. 1060 (April 1987) and authorities cited therein. As shown by the shocking hearing transcripts appended hereto [A-64-86], the appointed Referee, as well as Chief Counsel to the Grievance Committee, do not recognize the authority of this Court in *In re Ruffalo*, *supra*, that disciplinary proceedings are "quasi-criminal", but regard them as civil matters [A-65-66].

The instant case is not an attack on the traditionally wide discretion afforded state courts in matters of attorney discipline, but rather the abuse of such discretion where it clearly impinges on the federally-protected due process rights recognized in the bedrock law of this Court. At issue here is the license of an attorney who was suspended [A-24] -- without notice of charges, a hearing, or findings of guilt -- and who, for almost four years, has been denied a hearing as to the basis for her suspension, as well as any and all judicial review.

The paramount ethical duty of lawyers, as "guardians of the law," is to protect our legal system. ABA Code of Professional

Responsibility, as adopted by the New York State Bar Association, Canon 1 "Integrity of Profession" and Canon 8 "Improving the Legal System." [A-17]. The case at bar is one which would support the view that Petitioner was suspended to silence and discredit her public advocacy of reform of New York's judicial selection process and to put an end to the public interest litigation she was carrying forward, *pro bono*, to accomplish that purpose.

Meeting ethical obligations under the Canons must properly include criticism of the judiciary and the judicial selection process, when warranted. It does so on paper in New York, as reflected in the ethical considerations governing Canon 8 of the Code of Professional Responsibility [A-17]. Where -- as here -- the disciplinary machinery is used so unabashedly to retaliate against a lawyer who is a judicial "whistleblower" -- the message to the profession is one of intimidation. This is yet another important reason for granting the writ, so that a different message is sent to the profession, one consonant with the high standards of its ethical codes.

I. New York's Attorney Disciplinary Law Unconstitutionally Permits Interim Suspension Orders Without a Pre- or Post-Suspension Hearing.

It is well settled decisional law of this Court that minimum due process requirements of notice and opportunity for a hearing must be satisfied before an individual can be deprived of a license, governmental entitlement or benefit he possesses, *Bell v. Burson*, 402 U.S. 535, 539 (1971)(citing numerous cases). Only upon a compelling showing of emergency can a hearing be deferred and, in such cases this Court has held that a post-suspension hearing must be provided "without. appreciable delay." *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

In *Barry*, the Court held that a New York state agency rule permitting the summary suspension of horse trainers violated

the Fourteenth Amendment because "it specifie[d] no time in which the hearing must be held, and it afford[ed] the [state regulatory] Board as long as thirty days after the conclusion of the hearing in which to issue a final order...." Barry, supra, at 60-61. By the standard of *Barry*, and this Court's other authorities, Respondent Second Department's interim suspension rule §691.4(l) [A-7-8] is, on its face, unconstitutional in that it does not require any hearing at all, either pre- or post-suspension. That §691.4(l) is also unconstitutional, as applied , is shown by the fact that under such rule provision, Petitioner was suspended from the practice of law without any hearing [A-24] and, for nearly four years, has been denied a hearing as to the basis for her suspension.

The facial infirmity of §691.4(l) was recognized by the New York Court of Appeals in *Matter of Russakoff*. 79 N.Y.2d 520, 583 N.Y.S.2d 949 (1992), where it cited *Barry*, *supra*, as well as *Gershenfeld v. Justices of the Supreme Court*, 641 F.Supp. 1419 (E.D. Pa 1986). *Gershenfeld* relied on *Barry* to hold that the interim suspension of an attorney is unconstitutional unless post-deprivation procedures assure "a prompt post-deprivation adversarial hearing."

However, the Court of Appeals, which vacated attorney Russakoff's interim suspension for lack of findings, did not invalidate §691.4(l) or the comparable interim suspension rules of the other three Appellate Divisions of the State, which its decision cited as defective. Rather, it only indicated that "[s]ome action to correct this omission seems warranted." (at 951).

To date, however, almost three years since the Court of Appeals decided *Russakoff*, Respondent Second Department has failed to correct its rules and, as to Petitioner, has repeatedly refused to take corrective action as to her specific suspension order [A-35 , A-45, A-46, A- 47].

Such facts and constitutional issues of due process and equal protection were presented to the Court of Appeals both by a direct appeal in the underlying disciplinary proceeding subsequent to *Russakoff*, as well as twice in the subject Article 78 proceeding. Petitioner squarely presented the issue as to the

constitutionality of open-ended interim suspension orders. Indeed, in the Article 78 proceeding, Petitioner explicitly pointed out that there was not even statutory authority for interim suspension orders -- a fact the Court of Appeals itself recognized in *Matter of Nuey*, 61 N.Y.2d 513, 515 (1984).

Consequently, the substantial constitutional issues here raised come before this Court because the Court of Appeals has failed and refused to strike down New York's court rules relating to the interim suspension of attorneys -- notwithstanding Petitioner four times presented her case to it [A-36, A-49, A-22, A-23]. That the Court of Appeals failed and refused to act where, additionally, Petitioner's interim suspension order is, on its face [A-24], devoid of the specific finding called for by the rule before it can be invoked to wit, "a finding that the attorney is guilty of professional misconduct immediately threatening the public interest" [A-7] makes manifest the need for this Court's review. The record starkly and unequivocally shows that the State of New York has deprived Petitioner not only of her due process rights under the Fourteenth Amendment, but her equal protection rights as well.

II. New York's Judiciary Law §90 Is Unconstitutional in Failing to Provide Disciplined Attorneys a Right of Judicial Review, Either by Direct Appeal or by the Codified Common Law Writs.

This Court has long recognized that where due process has *not* been afforded by the tribunal of first instance, appellate review is an essential component of due process, *Mildner*, *supra*, dissenting opinion, at 223, citing numerous authorities of this Court.

The record in the case at bar shows that in the underlying disciplinary proceeding Petitioner was suspended under an interim order without any notice of charges and without any hearing, denying her the fundamentals of due process *ab initio*. Such

suspension -- as to which neither Respondent Second Department nor the Grievance Committee has made any findings -- is, additionally, "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause...." Cf. *Garner v. State of Louisiana*, 386 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960) [A-37-44].

Consequently, appellate review is a due process right. However, Judiciary Law §90(8) provides no right of appeal from interim orders of suspension [A-9]. Such consequence flows from the fact that interim suspension orders are not themselves statutorily authorized. *Matter of Nuey, supra*, 515.

Thus, Petitioner twice sought judicial review by direct appeal to the Court of Appeals, once by leave and once by right, only to be denied review each time [A-36, A-49]. At the time of the second denial, which the Court of Appeals explicitly stated was for "lack of finality" [A-49], her interim suspension order had then been in effect for 17 months.

Traditionally, where the remedy at law is inadequate, relief is obtainable by the common law writs to prevent or redress irreparable harm. Yet, New York's highest court here permitted, *sub silentio*, the destruction of the common law writs, codified in CPLR Article 78, which would otherwise have afforded Petitioner the judicial review unavailable in the direct appeal.

It did this by allowing to stand the Judgment of Respondent Second Department [A-20], wherein the very judges, whose orders were being challenged in the Article 78 proceeding, decided "the merits" of their own case. [cf. A-24, A-32, A-33, A-34, A-35, A-45, A-46, A-47, A-49, A-50, A-53, A-55, A-57, A-59, A-61, A-63]. Such adjudication not only subverted the historic purpose behind the writs, but violated one of the most basic tenets of due process, "that no man shall be judge of his own cause". *Spencer v. Lapsley*, 61 U.S. 264 (1858); *In re Murchison*, 349 U.S. 623 (1955; *Canon 3(C) of the Code of Judicial Conduct* [A16], *Canon* 3C, §103.3(c) of the *Rules Governing Judicial Conduct* [A-15], which is incorporated by reference into the New York State Constitution, and, additionally,

Judiciary Law §14 [A-11].

Because Judiciary Law §90(2) vests original jurisdiction of attorney disciplinary matters in the Appellate Divisions of its Supreme Court [A-9], the only higher tribunal in the State of New York is the Court of Appeals. The venue provisions pertinent to Article 78 [A-14, A-11], while recognizing that the writs run from higher to lower courts, do not specify the venue for such proceedings as against Appellate Division judges.

Under the New York State Constitution, the Court of Appeals has no original jurisdiction. At the same time, Supreme Court judges of the State of New York, sitting on its Appellate Division, are not expressly excluded by the Article 78 statute. Nor would there be any rational state purpose served by such exclusion, particularly in disciplinary proceedings, where Appellate Division judges exercise original jurisdiction.

Indeed, in the case at bar, Respondent Second Department did not state that Article 78 relief was unavailable against Appellate Division judges, when it granted its own attorney's dismissal motion "on the merits." Such Judgment [A-20] flew in the face of its own precedent, recognizing that Article 78 can only be granted as against an inferior tribunal. *Colin v.. Appellate Division, First Department*, 3 A.D.2d 682, 159 N.Y.S.2d 99 (2nd Dept. 1957), citing *Smith v. Whitney*, 116 U.S. 167 (1986).

Neither in *Colin* nor *Matter of Capoccia*, 104 A.D.2d 536, 479 N.Y.S.2d 160 (3rd Dept. 1984), 480 N.Y.S.2d 160 (4th Dept. 1984) -- an Article 78 proceeding against Appellate Division judges arising out of a disciplinary proceeding -- did the three Appellate Divisions involved suggest that an Article 78 proceeding does not lie against Appellate Division judges.

The federal courts, both in *Mildner*, *supra*, and *Javits v. Stevens*, 382 F. Supp. 131, 140 (S.D.N.Y. 1974), on which *Mildner* relied, accepted unquestioningly that Article 78 was not available as a remedy to provide judicial review to disciplined lawyers. Neither of those courts discussed the significance of the unavailability of Article 78 review. Such would have required them to address the constitutionality of Judiciary Law §90 [A-9]

in vesting original jurisdiction over disciplinary proceedings in a lower court, which is not reviewable by the common law writs codified by Article 78.

It may well be inferred that the reason New York courts in *Colin*, *Capoccia*, and the case at bar have not openly declared that Article 78 relief does not lie against Appellate Division judges is because to do so would expose the unconstitutionality of Judiciary Law §90.

Moreover, in both *Mildner* and *Javits*, the courts -- notwithstanding the practical realities of the cases presented to them showing that the disciplined attorney petitioners therein were wholly deprived of any review of their constitutional due process claims[10] -- took the view that the limited review of final orders provided by Judiciary Law §90(8) [A-9] was not unconstitutional.

Consequently, neither of those courts was forced to confront the extraordinary issue herein presented -- which appears to be of first impression. Whether a state can constitutionally deny not only judicial review by direct appeal, but judicial review by the remedies available by the common law writs.

On this set of facts, where Judiciary Law 90(8) provides no statutory right of appeal from an interim suspension order and where New York courts have *sub silentio* nullified Petitioner's Article 78 remedy to obtain review by the common law writs, Judiciary Law §90 cannot be constitutionally permissible.

III. The Combination of Prosecutorial and Adjudicative Functions in New York's Disciplinary Scheme Is Unconstitutional and Lends Itself to Retaliation Against Judicial Whistle-Blowers.

This Court has recognized that a combination of functions

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[10] See particularly, the court's recitation in *Javits*, *supra*, at 134, of the exhaustive attempts by attorney Javits to obtain judicial review of his claims of constitutional violations -- all futile.

in one individual or body is constitutionally suspect, *Withrow v. Larkin*, 421 U.S. 35 (1975); *see also*, e.g. *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164 (2d Cir. 1992); *Finer Foods Sales Co. v. Block*, 708 F.2d 774 (D.C. Cir. 1983); *In re DiMeo*, 697 F.2d 805, 807 (7th Cir. 1983) (noting that the combination of judicial and prosecutorial functions is "alien to traditional conceptions of the judiciary."

New York's disciplinary scheme is not merely suspect and "alien," but, as this case establishes, constitutionally intolerable. It is a sharp contrast to the typical civil-service protected administrative/adjudicative process, which was the basis of the Court's above-cited precedents.

In New York, the Appellate Divisions control all aspects of the prosecutorial and adjudicative functions. As reflected by §691.4 [A-4], the Second Department appoints the Chief Counsel of the Grievance Committee, who serves as an at-will salaried employee. Respondent Second Department, likewise, appoints every member of the Grievance Committee, including its Chairman [A-5, A-67], who serve without compensation . It also appoints the Referee, whose compensation is paid per diem for his hearing of the disciplinary proceedings, his function being to "hear and report," not to determine. The Court is free to disregard his findings , *Mildner*, *supra*, at 190.

Where all persons participating in the investigatory, prosecutorial, and hearing functions are serving at Respondent Second Department's pleasure, with no security of continued tenure and prestige should their actions displease that court, there can be no true independence, in fact or in appearance.

In practice, the situation is far worse because the fundamental check of review by a Grievance Committee does not function in any real sense. The Committee is, in fact, a "rubber stamp" for the Appellate Division appointed Chief Counsel. This is dramatically reflected by the case at bar where the procedural prerequisites of §691.4(e)(4) [A-5] that have not been complied are those which establish committee action -- most obviously, the prescribed pre-petition hearing before the committee.

The palpably aberrant and punitive suspension of Petitioner's license, the perpetuation of her suspension despite its patently unlawful character, and the array of disciplinary proceedings brought against Petitioner without compliance with due process prerequisites, are inexplicable except as the product of a retaliatory motivation. When a proceeding is fraught with procedural abuses, or is timed to prevent exercise of fundamental rights, such a motive may be inferred. *Lewellyn v. Raff*, 843 F.2d 1103, 1110 (8th Cir. 1988); *Herz v. Degnan*, 648 F.2d 201, 209-10 (3rd Cir. 1981).

In *Lewellyn*, state officials scheduled the plaintiff attorney's criminal trial 24 days before the election in which he was running. Their timing of the trial to interfere with the election established a motive to retaliate and discourage plaintiff's exercise of his rights under the First Amendment. In *Herz*, the state attorney general attempted to revoke plaintiff's license to practice psychiatry on grounds not stated in the governing statute, without notice, and without a hearing. The court found that the *ex parte* order in question strongly suggested "bad faith and harassment" and "official lawlessness" in violation of plaintiff's constitutional rights. 648 F.2d at 208-210. The record in the instant case is replete with Respondents' repeated procedural violations. Moreover, the issuance of the October 18, 1990 Order [A-31], the day before the scheduled argument in the Appellate Division, Third Department of *Castracan v. Colavita* and the timing of a June 14, 1991order of suspension [A-24], served upon Petitioner the day before the last date to file a Notice of Appeal with the Court of Appeals in *Castracan*, were calculated to, and did, interfere with her fundamental First Amendment rights.

Petitioner's public criticism of members of the state judiciary, her challenge to judicial selection practices in New York and her efforts to remedy abuses in the system through litigation constitute political speech of the most fundamental kind. The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *C.B.S.*

Inc. v. F.C.C., 453 U.S. 367, 396 (1981) (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272). As this Court noted in *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), "speech concerning public affairs is more than self expression, it is the essence of self-government. The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *See also In re Primus*, 436 U.S. 412 (1978); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) (litigation is a form of political expression protected by the First Amendment).

Efforts to control attorneys' speech are subject to "exacting scrutiny", and "[o]nly upon the showing of a compelling interest may such a fundamental right be encroached upon." *Primus*, at 428, 432, 438 & n.32; *Button*, at 439. However, the state has no legitimate interest in initiating and prosecuting retaliatory proceedings, *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (the state "by definition does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally-protected rights"); *Lewellyn v. Raff*, 843 F.2d 1103, 1110 (8th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *Phelps v. Hamilton*, 828 F. Supp. 831, 843 (D. Kan 1993); *Ruscavage v. Zuratt*, 821 F. Supp. 1078, 1082 (E.D. Pa. 1993). *Accord ,Haynesworth v. Miller*, 820 F.2d 1245, 1255 (D.C. Cir. 1987) (it is "'patently unconstitutional' to 'penalize those who choose to exercise' constitutional rights" (citing *United States v. Jackson*, 390 U.S. 570, 581 (1968); *Fitzgerald v. Peek*, 636 F.2d 943, 944-45 (5th Cir.), *cert. denied*, 452 U.S. 916 (1981) (an action brought by state officials in bad faith in order to harass and punish the plaintiffs for criticizing officials violated the plaintiffs' First Amendment rights); *Dixon v. District of Columbia*, 394 F.2d 966, 968 (D.C. Cir. 1968) ("The government may not prosecute for the purpose of deterring people from their right to protest official misconduct.").

As this Court long ago observed in *In re Garland*, 71 U.S. 333,

379-80 (1866), while the state may prescribe qualifications for attorneys to engage in the practice of law, that power may not be exercised by the state "as a means for the infliction of punishment, against the prohibition of the Constitution." *Accord Primus, supra*, at 428, 432, 438; *N.A.A.C.P. v. Button, supra*, 415, 429-30, 439 ("a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"); *Johnson v. Avery*, 393 U.S. 483, 490, n. 11 (1969) ("the power of the states to control the practice of law cannot be exercised so as to abrogate federally protected rights"); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

IV. Judiciary Law §90 and the Related Rules of the Appellate Division, Second Department Are Unconstitutionally Vague and Have Been Applied in an Unconstitutional Manner.

Judiciary Law §90 [A-9] confers no express rule-making authority on the Appellate Divisions relative to attorney disciplinary proceedings, other than that granted under subdivision 10 pertaining to confidentiality [A-10]]. Respondent Second Department has no published rules as to Judiciary Law §90(10). As to the disciplinary rules promulgated by Respondent Second Department as its Rules Governing the Conduct of Attorneys, 22 NYCRR Part 691, there is no rule-making history available to the public, including accused attorneys.

Even before *Ruffalo, supra*, this Court held, in a case construing Judiciary Law §90 in the context of bar admissions, that a state could not constitutionally deny an attorney admission based on *ex parte* committee reports. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963): "Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, '[t]he requirements of fairness are not exhausted in the taking or consideration of

evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.'" 105, citing *Morgan v. United States*, 304 U.S. 1, 20.

Yet, in the *a fortiori* case of an attorney already admitted to the bar, New York courts use *ex parte* committee reports, whose existence and content are unknown to the accused attorney, as a basis upon which to authorize the commencement of "quasi-criminal" disciplinary proceedings, depriving him of notice and opportunity to be heard at the outset.

As reflected by the record in both the disciplinary and Article 78 proceedings, Respondent Second Department abused the confidentiality provision of Judiciary Law §90(10) to deny Petitioner access to the *ex parte* committee reports underlying the prosecutions against her. This plainly conflicts with *Willner* and the authorities cited therein.

22 NYCRR §691.4(e)(4), (f), and (h) set forth the jurisdictional prerequisites which must be met for a grievance committee to recommend prosecution of an attorney [A-5]. Such prerequisites are protections that an attorney will not be subjected to prosecution without a "probable cause" finding based on an evidentiary hearing. However, §691.4(e)(5) [A-6] then vitiates these due process protections by permitting a grievance committee to dispense with them "where the public interest demands prompt action and where the available facts show probable cause for such action" [A-6]. Those two broadly-stated criteria are not defined whatsoever. Such provision provides the affected attorney with no notice or opportunity to be heard by the grievance committee so as to contest the applicability of that subdivision before the committee "forthwith recommends to the court the institution of a disciplinary proceeding."

In the case at bar, Respondent Second Department permitted the Grievance Committee to make its applications for authorization to commence three separate disciplinary proceedings against Petitioner, without any compliance with the pre-petition requirements of written charges, an evidentiary hearing, and

findings of probable cause based thereon. In each proceeding, this was done entirely without notice to her or opportunity to be heard. The resulting orders [A-63, A-50, A-55, A-57], wholly *ex parte*, do not identify such fact. Nor do they identify the specific subdivision of §691.4 being invoked or set forth any findings -- either by Respondent Second Department or the Grievance Committee, pursuant to which the recommendation, if any, was made or authorization granted. None of the orders authorizing prosecution, in fact, alleged that authorization was pursuant to a recommendation of the Grievance Committee, based on a majority vote thereof, as explicitly required by §691.4(e) and (h) [A-5-6].

The three petitions thereafter served upon Petitioner, two after her suspension -- all set forth "on information and belief" -- similarly failed to plead the specific subdivision of §691.4 being invoked, and made no evidentiary showing permitting invocation of the exigency provision of §691.4(e)(5), so as to dispense with the due process prerequisites of §691.4(e)(4), (f), and (h). Indeed, as to the latter two petitions, §691.4(e)(5) was palpably inapplicable, Petitioner having already been suspended.

The issue of the failure of a disciplining court to follow its own disciplinary rules is discussed in *Matter of Thalheim*, 853 F.2d 853 (5th Cir. 1988). In *Thalheim*, the Circuit Court invalidated an attorney's suspension imposed in the absence of a recommendation by disciplinary panel, where such was required under the court's disciplinary rules, stating: "Attorney...suspension cases are quasi-criminal in character...Accordingly, the court's disciplinary rules are to be read strictly, resolving any ambiguity in favor of the person charged. Moreover, the same principle of construction follows from the fact that it was the court that drafted these rules. The court wrote its own rules; it must abide by them." Thalheim, at 388.

At every juncture, and most egregiously in connection with Petitioner's interim suspension, Respondent Second Department has ignored its own rules and, when challenged by Petitioner in legally and factually meritorious motions, has refused to account for its actions. Its continuum of summary

decisions, without findings or reasons, are reflective that it cannot legally or factually justify its orders. Indeed, although in the case of interim suspensions, the Second Department's own rules [A-8] require it to "briefly state its reasons", it did not do so when it suspended Petitioner, as reflected by the face of its June 14, 1991 interim suspension order [A-24].

In addition to being statutorily unauthorized and omitting any requirement of a hearing, the interim suspension rule provision of §691.4(l) also contains no requirement of wilfulness or mala fides in connection with the act(s) constituting a basis for the interim suspension. The safeguards attaching to contempt, the traditional remedy for wilful failure to obey court orders, including an evidentiary hearing, with discovery and appellate rights, not to mention judicial review by appeal, or an Article 78 proceeding, if appropriate, are all wiped out.

Here, Petitioner was suspended for alleged failure to comply with an order [A-31] which she had lawfully challenged as unlawful, and was forthwith publicly suspended upon denial of her challenge [A-33], without opportunity to seek a stay pending appeal or to comply. The issues she raised on that challenge have never been resolved, most notably, the "petition" requirement for commencing a proceeding to determine incapacity under 691.13(b)(1) [A-]. As shown by the October 18, 1990 order, this is the very rule provision upon which the Chief Counsel to the Grievance Committee relied when he sought Petitioner's suspension. Notwithstanding that such rule explicitly requires the designation of medical experts to be by the court, the October 18, 1990 order [A-31] instead granted to Petitioner's prosecutor the power to appoint a medical expert.

That the court issues peremptory orders, rather than rendering reasoned opinions , when issues as to interpretation are presented to it means that the rules are really a sham for whatever the court wishes to make of them. As Judge Weinstein noted in *Mildner*, such practice prevents development of the law and "undercuts both due process and constitutional vlaude" (at 217)

From the foregoing, it is manifest that this Court's

authoritative voice needs to be heard on the subject of attorney disciplinary procedures so that, as sanguinely stated in *Spivack v Klein*, 385 U.S. 516 (1967) "lawyers also [can]enjoy first class citizenship."

CONCLUSION

The petition for a writ of certiorari should be granted in the interest of justice.

Respectfully submitted,

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CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

FIRST AMENDMENT TO THE U.S. CONSTITUTION:

Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT TO THE U.S. CONSTITUTION:

...nor shall any person...be deprived of life, liberty, or property, without due process of law...

SIXTH AMENDMENT TO THE U.S. CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION:

Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE 1, §1:

No member of this state shall be...deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers...

ARTICLE 1, §6:

...No person shall be deprived of life, liberty or property without due process of law.

ARTICLE 1, §8:

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech...

ARTICLE 1, §11:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof...

ARTICLE VI, §3(7):

No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

ARTICLE VI, §20b(4):

...Judges and justices of the courts specified in this subdivision shall also be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals."

ARTICLE VI, §28.c.:

The chief judge, after consultation with the administrative board, shall establish standards and administrative policies for general application throughout the state, which shall be submitted by the chief judge to the court of appeals, together with the recommendations, if any, of the administrative board. Such standards and administrative policies shall be promulgated after approval by the court of appeals.

NEW YORK CODE OF RULES AND REGULATIONS

SECOND DEPARTMENT'S RULES GOVERNING THE CONDUCT OF ATTORNEYS:

22 NYCRR §691.4 Appointment of grievance committees; commencement of investigation of attorney misconduct; complaints; procedures.-

(a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

(b) **(1)** Each grievance committee shall consist of 19 members and a chairman, all of whom shall be appointed by this court and 16 of whom shall be attorneys. The chairman shall have the power to appoint an acting chairman from among the members of the grievance committee. Appointments may be made from lists of prospective members submitted by the following county bar associations within the second judicial department: Brooklyn Bar Association, Dutchess Bar Association, Bar Association of Nassau County, New York, Inc., Orange County Bar Association, Putnam County Bar Association, Queens County Bar Association, Richmond County Bar Association, Rockland County Bar Association, Inc., Suffolk County Bar Association and Westchester County Bar Association. This court shall, in consultation with the committees appoint a chief counsel to each such grievance committee and such assistant counsel and supporting staff as if deems necessary.

(2) Five persons shall be appointed to each such committee for a term of one year, five persons for a term of two years, five persons for a term of three years and five persons for a term of four years. Thereafter, yearly appointments of five persons shall be made to each such committee for a term of four years. No person who has served two consecutive terms shall be eligible for reappointment until the passage of one year from the expiration of his second such term. The person appointed chairman shall serve as chairman for a term of two years and shall be eligible for reappointment as chairman for not more than one additional term of two years.

(c) Investigation of professional misconduct may be commenced upon receipt of a specific complaint by this court or by any such committee, or such investigation may be commenced sua sponte by this court or such a committee. Complaints must be in writing and signed by the complainant but need not be verified. Complainants shall be notified by the committee of actions taken by it with respect thereto.

(d) Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chairman. Such subcommittees may hold hearings as hereinafter authorized.

(e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a

hearing on the matter as set forth in subdivision (f) of this section;

(5) forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.

(f) Except as otherwise provided for in paragraph (5) of subdivision (e) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than 20 days, shall be served upon the person concerned, either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence. Stenographic minutes of the hearing shall be kept.

(g) Whenever in the course of a hearing evidence is presented upon which another charge or charges against the respondent might be made, it shall not be necessary for the committee to prepare and serve an additional charge or charges on the respondent, but the committee or the subcommittee may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing, the committee shall promptly meet and either dismiss or sustain the charges and, as to any charges sustained, shall either issue a letter of caution, admonish the respondent, or recommend that probable cause exists for the filing of disciplinary charges against the respondent in this court. A letter of caution may also be issued where the charges have been dismissed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

(i) In the event that a minority of the committee disagrees with a final determination, such minority report shall be filed with this court along with any majority report and the written report of the subcommittee. Upon such filing, the committee shall await the determination of this court before otherwise disposing of the matter.

(j) Unless otherwise provided for by this court, all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential.

(k) Disciplinary proceedings shall be granted a preference by this court.

(l) (1) An attorney who is the subject of an investigation, or of charges by a grievance committee of professional misconduct, or who is the subject of a disciplinary proceeding pending in this court against whom a petition has been filed pursuant to this section, or upon whom a notice has been served pursuant to section 691.3(b) of this Part, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:

(i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or the attorney's failure to submit a written answer to a complaint of professional misconduct within 10 days of receipt of a demand for such an answer by the grievance committee, served either personally or by certified mail upon the attorney or the attorney's failure to comply with any of the lawful demand of this court or the grievance committee made in connection with any investigation, hearing or disciplinary proceeding; or

(ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or

(iii) other uncontroverted evidence of professional misconduct.

(2) The suspension shall be made upon the application of the Grievance Committee to this court, after notice of such application has been given to the attorney pursuant to subdivision six of section 90 of the Judiciary Law. The court shall briefly state is [sic] reasons for its order of suspension which shall be effective immediately

and until such time as the disciplinary matters before the Committee have been concluded, and until further order of this court.

§691.13 Proceedings where attorney is declared incompetent or alleged to be incapacitated.

(b)(1) ***Proceeding to determine alleged incapacity and suspension upon such determination.***

Whenever a committee appointed pursuant to section 691.4(a) of this Part shall petition this court to determine whether an attorney is incapacitated from continuing to practice law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, this court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including examination of the attorney by such qualified medical experts as this court shall designate. If, upon due consideration of the matter, this court is satisfied and concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order suspending him on the ground of such disability for an indefinite period and until the further order of this court and any pending disciplinary proceedings against the attorney shall be held in abeyance.

(c)(1) ***Procedure when respondent claims disability during course of proceeding.***

If, during the course of a disciplinary proceeding, the respondent contends that he is suffering from a disability by reason of mental infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent adequately to defend himself, this court thereupon shall enter an order suspending the respondent from continuing to practice law until a determination is made of the respondent's capacity to continue the practice of law in a proceeding instituted in accordance with the provisions of subdivision (b) of this section.

NEW YORK STATUTES

Judiciary Law §90

2. The supreme court shall have power and control over attorneys and counselors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counselor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another...
...In the case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

6. Before an attorney or counselor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense....

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counselor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein,

subject to the limitations prescribed by article six, section seven, of the constitution of this state.

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counselor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

Judiciary Law, §14.

Disqualification of judge by reason of interest or consanguinity

A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested...

CPLR: CIVIL PRACTICE LAW AND RULES

§408. Disclosure.

Leave of court shall be required for disclosure...

§506. Where special proceeding commenced.

(b) Proceeding against body or officer. A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located, except that

1. a proceeding against a justice of the supreme court or a judge of a county court or the court of general sessions shall be commenced in the appellate division in the judicial department where the action, in the course of which the matter sought to be enforced or restrained originated, is triable, unless a term of the appellate division in that department is not in session, in which case the proceeding may be commenced in the appellate division in an adjoining judicial department;

§3025. Amended and supplemental pleadings.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or

subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

Rule 3211. Motion to Dismiss.

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

7. the pleading fails to state a cause of action;

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(e) Number, time and waiver of objections; motion to plead over.

...where a motion is made on the ground set forth in paragraph seven of subdivision (a), ...if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave.

§7801. Nature of Proceeding.

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

§7803. Questions Raised.

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

§7804. Procedure.

(a) Special proceeding. A proceeding under this article is a special proceeding.

(b) Where proceeding brought. A proceeding under this article shall be brought in the supreme court in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides.

...

(d) Pleadings. There shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party here shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of. There shall be a reply to a counterclaim denominated as such and there shall be a reply to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed. The court may permit such other pleadings as are authorized in an action upon such terms as it may specify.

(e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact. The court may order the body or officer to supply any defect or omission in the answer, transcript or answering affidavit. Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted.

(f) Objections in point of law. The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as my be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry. The petitioner may raise an objection in

point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard.

RULES GOVERNING JUDICIAL CONDUCT

Section 100.3 Impartial and diligent performance of judicial duties.

(c) Disqualification. (1) A judge shall disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned, including, but not limited to circumstances where:

(i) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(iii) the judge knows that he or she...has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(iv) the judge...

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(c) is to the judge's knowledge likely to be a material witness to the proceeding;

CODE OF JUDICIAL CONDUCT

Canon 3: A Judge Should Perform the Duties of His Office Impartially and Diligently

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he knows that he...has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

ABA CODE OF PROFESSIONAL RESPONSIBILITY

Canon 1: A lawyer should assist in maintaining the integrity and competence of the legal profession.

Canon 8: A lawyer should assist in improving the legal system.

Ethical Considerations

EC 8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication.

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Preamble: a Lawyer's Responsibilities

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.

A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system.

Rule 8.3 Reporting Professional Misconduct

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

COMMENT

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

_____AD2d_____

WILLIAM C. THOMPSON, J.P.
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR.
ALBERT M. ROSENBLATT, JJ.

93-02925
In the Matter of Doris L. Sassower,
petitioner, v. Guy James Mangano,
etc., et al., respondents.

Doris L. Sassower, White Plains, N.Y., petitioner *pro se*.

Robert Abrams, Attorney-General, New York, N.Y. (John J. Sullivan and Carolyn Cairns Olson of counsel), for respondents.

Proceeding pursuant to CPLR article 78, *inter alia*, in the nature of a writ of prohibition to bar the respondents from taking any further action with respect to an attorney disciplinary petition dated February 6, 1990, in which the respondents moved to dismiss the CPLR article 78 proceeding for failure to state a cause of action and as barred by the Statute of Limitations, and the petitioner cross-moved, *inter alia*, to (1) stay prosecution of the disciplinary proceeding under the petition dated February 6, 1990, as well as a petition dated January 28, 1993, and a supplemental petition dated March 25, 1993, (2) recuse the Justices of the Appellate Division, Second Department, from presiding over this CPLR article 78 proceeding pursuant to the Code of Judicial Conduct Canon 3(C), and transferring it to another Judicial Department, and (3) compel production of a Grievance Committee Report dated July 31, 1989, upon which the petition dated February 6, 1990 is based, the Grievance Committee Report dated December 17, 1992, upon which the supplemental petition dated March 25, 1993, is based, and the Grievance Committee Report dated July 8, 1992, upon which the petition dated January 8, 1993, is based, and for other disclosure pursuant to CPLR 408

and 3101(a).

ORDERED that the respondents' motion to dismiss the CPLR article 78 proceeding is granted; and it is further,

ORDERED that the petitioner's cross motion is denied in its entirety; and it is further,

ADJUDGED that the petition is denied and the CPLR article 78 proceeding is dismissed on the merits; and it is further,

ORDERED that the respondents are awarded one bill of costs.

The remedy of prohibition is available only where there is a clear legal right and, in instances where judicial authority is challenged, only when a court acts or threatens to act either without jurisdiction or in excess of its authorized powers (*see, Matter of Holtzman v. Goldman*, 71 NY2d 564, 569). Inasmuch as the petitioner's jurisdictional challenge can be addressed in the underlying disciplinary proceeding or by way of a motion to confirm or disaffirm a referee's report, the petitioner is not entitled to the extraordinary remedy of prohibition.

THOMPSON, J.P., BRACKEN, SULLIVAN, BALLETTA and ROSENBLATT, JJ., concur.

ENTER

Martin H. Brownstein
Clerk

September 20, 1993

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of May 1994

PRESENT, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 529 SSD 41

In the Matter of Doris L. Sassower,
Appellant,

v.

Guy James Mangano, &c., et al.,
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal, insofar as it is taken from that part of the Appellate Division order that denied petitioner's cross motion, be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that that part of the order does not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the appeal, insofar as it is taken from the remainder of the Appellate Division order, be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Judges Levine and Ciparick took no part.

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of September 1994

PRESENT, HON. JUDITH S. KAYE, Chief Judge, presiding.

2-11 Mo. No. 993

In the Matter of Doris L. Sassower,
Appellant,

v.

Guy James Mangano, &c., et al.,
Respondents.

A motion for reconsideration of this Court's May 12, 1994 order of dismissal of appeal and a motion for leave to appeal to the Court of Appeals &c. in the above cause having heretofore been made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reconsideration of this Court's May 12, 1994 order of dismissal be and the same hereby is denied; and it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from so much of the Appellate Division order as denied petitioner's cross motion, be and the same hereby is dismissed upon the ground that that part of the order does not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal &c. otherwise be and same hereby is denied.

Judges Levine and Ciparick took no part.

Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

7404T
B/kr

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
THOMAS R. SULLIVAN, JJ.

90-00315 Atty.

DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower, an attorney and counselor at law.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

By decision and order of this court dated October 18, 1990, the petitioner's motion to suspend the respondent from the practice of law for an indefinite period and until the further order of this court based upon respondent's incapacity and for an order directing that the respondent be examined by a qualified medical expert to determine whether the respondent is incapacitated from continuing to practice law was granted to the extent that the respondent was directed to be examined by a qualified medical expert, to be arranged for by Chief Counsel for the Grievance Committee for the Ninth Judicial District, to determine whether the respondent is incapacitated from continuing to practice law pursuant to §691.13(b)(1) of the Rules of this Court [22 NYCRR §691.13(b)(1)], and the motion to suspend the respondent from the practice of law was held in abeyance pending the receipt and consideration of the report of the medical expert.

The petitioner now moves to suspend the respondent from the practice of law for an indefinite period and until further order of this court based upon the respondent's failure to comply with the October 18, 1990 order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that the respondent, Doris L. Sassower, pursuant to Section 691.4(l) of the Rules Governing the Conduct of Attorneys (22 NYCRR 691.4[l]) is immediately suspended from the practice of law in the State of New York, until the further order of this court; and it is further,

ORDERED that Doris L. Sassower shall promptly comply with this court's rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law §90, during the period of suspension and until the further order of this court, the respondent, Doris L. Sassower, is commanded to desist and refrain (1) from practicing law in any form, either as principal or as agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) from giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) from holding herself out in any way as an attorney and counselor-at-law.

MANGANO, P.J., THOMPSON, BRACKEN, KUNZEMAN and SULLIVAN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

June 14, 1991

1989 Martindale Hubbell Law Directory Listing, annexed as part of Exhibit "K" to Petitioner's motion to the Court of Appeals for reargument, reconsideration, leave to appeal, and other relief

Martindale-Hubbell Law Directory
New York
One Hundred and Twentieth Annual Edition

DORIS L. SASSOWER, P.C.

...

DORIS L. SASSOWER, born New York, N.Y., September 25, 1932; admitted to bar, 1955, New York; 1961, U.S. Supreme Court, U.S. Claims Court, U.S. Court of Military Appeals and U.S. Court of International Trade. *Education:* Brooklyn College (B.A., summa cum laude, 1954); New York University (J.D., cum laude, 1955). Phi Beta Kappa. Florence Allen Scholar. Law Assistant: U.S. Attorney's Office, Southern District of New York, 1954-1955; Chief Justice Arthur T. Vanderbilt, Supreme Court of New Jersey, 1956-1957. President, Phi Beta Kappa Alumnae of New York, 1970-71. President, New York Women's Bar Association, 1968-1969. President, Lawyers' Group of Brooklyn College Alumni Association, 1963-1965. Recipient: Distinguished Woman Award, Northwood Institute, Midland, Michigan, 1976. Special Award "for outstanding achievements on behalf of women and children," National Organization for Women--NYS, 1981; New York Women's Sports Association Award "as champion of equal rights," 1981. Distinguished Alumna Award, Brooklyn College, 1973. Named Outstanding Young Woman of America, State of New York, 1969. Nominated as candidate for New York State Court of Appeals, 1972. Columnist: ("Feminism and the Law") and Member, Editorial Board, Woman's Life Magazine, 1981. Author: Book Review, *Support Handbook, ABA Journal,* October, 1986; Anatomy of a Settlement Agreement, Divorce Law Education Institute 1982; "Climax of a Custody Case," *Litigation,* Summer, 1982; "Finding a Divorce Lawyer you can Trust," *Scarsdale Inquirer,* May 20, 1982. "Is this Any Way to Run an Election?" *American Bar Association Journal*, August 1980; "The Disposable Parent: The Case for Joint Custody," Trial Magazine, April, 1980. "Marriages in Turmoil: The Lawyer as Doctor," Journal of Psychiatry and Law, Fall, 1979. "Custody's Last Stand," Trial Magazine, September, 1979; "Sex Discrimination-How to Know It When You See

It," *American Bar Association Section of Individual Rights and Responsibilities Newsletter,* Summer, 1976; "Sex Discrimination and The Law," *NY Women's Week*, November 8, 1976; "Women, Power and the Law," *American Bar Association Journal,* May 1976; "The Chief Justice Wore a Red Dress," *Woman in the Year 2000,* Arbor House, 1974; "Women and the Judiciary: Undoing the Law of the Creator, *Judicature*, February 1974; "Prostitution Review," *Juris Doctor*, February,, 1974; "'No-Fault' Divorce and Women's Property Rights," *New York State Bar Journal*, November, 1973; "Marital Bliss: Till Divorce Do Us Part," *Juris Doctor*, April, 1973; "Women's Rights in Higher Education," *Current,* November 1972; "Women and the Law: The Unfinished Revolution," *Human Rights,* Fall 1972; "Matrimonial Law Reform: Equal Property Rights for Women," *New York State* Bar American Bar Association Journal, April, 1971; "The Role of Lawyers in Women's *Journal*, October 1972; "Judicial Selection Panels: An Exercise in Futility?" *New York Law Journal,* October 22, 1971; "Women in the Law: The Second Hundred Years," *American Bar Association Journal,* April 1971; The Role of Lawyers in Women's Liberation," *New York Law Journal*, December 30, 1970; "The Legal Rights of Professional Women," *Contemporary Education,* February, 1972; "Women and the Legal Profession," *Student Lawyer Journal,* November, 1970; "Women in the Professions," *Women's Role in* Contemporary Society, 1972; "The Legal Profession and Women's Rights," *Rutgers Law Review*, Fall, 1970; "What's Wrong With Women Lawyers?", Trial Magazine, October-November 1968. Address to: The National Conference of Bar Presidents, Congressional Record, Vol. 1u15, No. 24 E 815-6, February 5, 1969; The New York Women's Bar Association, Congressional Record, Vol. 114, No. E5267-8, June 11, 1968. Director: New York University Law Alumni Association, 1974; International Institute of Women Studies, 1971; Institute on Women's Wrongs; 1973; Executive Woman, 1973. Co-organizer, National Conference of Professional and Academic Women, 1970. Founder and Special Consultant, Professional Women's Caucus, 1970. Trustee, Supreme Court Library, White Plains, New York, by appointment of Governor Carey, 1977-1986 (Chair, 1982-1986). Elected Delegate, White House Conference on Small Business, 1986. Member, Panel of Arbitrators, American Arbitration Association. *Member:* The Association of Trial Lawyers of America; The Association of the Bar of the City of New York; Westchester County, New York State (Member: Judicial Selection Committee; Legislative Committee, Family

Law Section), Federal and American (ABA Chair, National Conference of Lawyers and Social Workers, 1973-1974; Member, Sections on: Family Law; Individual Rights and Responsibilities Committee on Rights of Women, 1982; Litigation) Bar Associations; New York State Trial Lawyers Association; American Judicature Society; National Association of Women Lawyers (Official Observer to the U.N., 1969-1970); Consular Law Society; Roscoe Pound-American Trial Lawyers' Foundation; American Association for the International Commission of Jurists; Association of Feminist Consultants; Westchester Association of Women Business Owners; American Womens' Economic Development Corp.; Womens' Forum. Fellow: American Academy of Matrimonial Lawyers; New York Bar Foundation.

Three-Year Judge-Trading Deal, annexed as part of Exhibit "K" to Petitioner's motion to the Court of Appeals for reargument, reconsideration, leave to appeal, and other relief

In furtherance of a mutual interest to promote a non-partisan judiciary populated by lawyers with universally acclaimed litigation skills, unblemished reputations for character and judicial temperament and distinguished civic careers, and to enable sitting judges of universally acclaimed merit to attain re-election to their judicial office without the need to participate in a partisan contest, the Westchester County (Republican) (Democratic) Committee joins with the Westchester County (Republican) (Democratic) Committee to Resolve:

That for the General Election of 1989, we hereby pledge our support, endorse and nominate Supreme Court Justice Joseph Jiudice, Supreme Court Justice Samuel G. Fredman and Albert J. Emanuelli, Esq. of White Plains, New York for election to the Supreme Court of the State of New York, Ninth Judicial District, and to call upon and obtain from our counterparts in Rockland, Orange, Dutchess and Putnam Counties similar resolutions; and

For the general election of 1990, assuming that the then Justice Albert J. Emanuelli will resign from the Supreme Court Bench to run for Surrogate of Westchester County and thereby create a vacancy in the Supreme Court, Ninth Judicial District to be filled in the 1990 general election, we hereby pledge our support, endorse and nominate County Court Judge Francis A. Nicolai as our candidate for the Supreme Court vacancy created by Judge Emanuelli's resignation, and to call upon and obtain from our counterparts in Rockland, Orange, Dutchess and Putnam counties resolutions and commitments to support Judge Francis A. Nicolai as their candidate to fill the vacancy created by the resignation of Judge Emanuelli; and we hereby pledge our support, endorse and nominate Albert J. Emanuelli as our candidate for Westchester County Surrogate in the 1990 general election.

For the general election of 1991, we hereby pledge our support, endorse and nominate Judge J. Emmet Murphy, Administrative Judge of the City Court of Yonkers, for election to the County Court of Westchester County to fill the vacancy anticipated to be created by the

election of Judge Francis A. Nicolai to the Supreme Court and Judge Adrienne Hofmann Scancarelli, Administrative Judge of the Family Court, Westchester County, for re-election to the Family Court, Westchester County; and

To require each of the above-named persons to pledge that, once nominated for the stated judicial office by both of the major political parties, he or she will refrain from partisan political endorsements during the ensuing election campaign and, thereafter, will provide equal access and consideration, if any, to the recommendation of the leaders of each major political party in connection with proposed judicial appointments.

We are resolved and agreed that the foregoing Resolution and pledges are intended to and shall be binding upon the respective Committees of the two major political parties during the years 1989, 1990 and 1991 and shall not be affected by any action or proposed action or court merger or court unification.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

0597T

(NOT TO BE PUBLISHED) B/nl

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
THOMAS R. SULLIVAN, JJ.

90-00315 Atty.

DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower, an attorney and counselor at law.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

Motion by petitioner to suspend respondent from the practice of law for an indefinite period and until the further order of this court based upon respondent's incapacity and for an order directing that respondent be examined by a qualified medical expert to determine whether respondent is incapacitated from continuing to practice law pursuant to §691.13(b)(1) of the Rules of this Court [22 NYCRR §691.13(b)(1)].

Respondent cross-moves for an order dismissing the disciplinary proceeding authorized against respondent by order of this court dated December 6, 1989, by reason, *inter alia*, of lack of personal jurisdiction.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the respondent is directed to be examined by a qualified medical expert, to be arranged for by Chief Counsel for the

Grievance Committee for the Ninth Judicial District, to determine whether the Respondent is incapacitated from continuing to practice law pursuant to § 691.13(b)(1) of the Rules of this Court [22 NYCRR §691.13(b)(1)]; and it is further,

ORDERED that petitioner's motion to suspend respondent is held in abeyance, and upon receipt of and consideration of the report of the medical expert, the court will determine whether to suspend respondent from the practice of law based upon her incapacity; and it is further,

ORDERED that respondent's cross-motion to dismiss the underlying disciplinary proceeding based upon, *inter alia*, lack of personal jurisdiction is denied.

MANGANO, P.J., THOMPSON, BRACKEN, BROWN and SULLIVAN, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

October 18, 1990

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

7320T
(NOT TO BE PUBLISHED) B/kr

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
THOMAS R. SULLIVAN, JJ.

90-00315 Atty.

DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower, an attorney and counselor at law, admitted under the name Doris Lipson Sassower.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

Motion by the respondent (1) to vacate the order of this court dated October 18, 1990, directing the respondent to be examined by a qualified medical expert pursuant to §691.13(b)(1) of the Rules of this Court and (2) to discipline Gary Casella, Esq.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, P.J., THOMPSON, BRACKEN, KUNZEMAN and SULLIVAN, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

June 12, 1991

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

7322T
(NOT TO BE PUBLISHED) B/kr

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
THOMAS R. SULLIVAN, JJ.

90-00315 Atty.

DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower, an attorney and counselor at law, admitted under the name Doris Lipson Sassower.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

Motion by the petitioner Grievance Committee for an order imposing financial sanctions and costs upon Eli Vigliano, Esq., counsel to the respondent Doris L. Sassower, pursuant to Part 130, Subpart 130-1 of the Uniform Rules of the New York State Trial Courts, for engaging in frivolous conduct.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied with leave to renew upon a showing of continued frivolous conduct as defined by §130-1.1(c) of the Rules of the Chief Administrator of the Courts (22 NYCRR 130-1.1[c]).

MANGANO, P.J., THOMPSON, BRACKEN, KUNZEMAN and SULLIVAN, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

June 12, 1991

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

8234T

(NOT TO BE PUBLISHED) B/nl

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
THOMAS R. SULLIVAN, JJ.

90-00315 Atty.

DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower, a suspended attorney.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

Motion by the respondent to vacate and/or modify this court's decision and order of June 14, 1991, suspending her from the practice of law until further order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, P.J., THOMPSON, BRACKEN, KUNZEMAN and SULLIVAN, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

July 15, 1991

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of September A.D. 1991

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

2-25 Mo. No. 890

In the Matter of Doris L. Sassower,
An Attorney and Counselor-at-Law.

Grievance Committee for the
Ninth Judicial District,
Respondent,

Doris L. Sassower,
Appellant.

A motion for leave to appeal to the Court of Appeals and to seal records and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion to seal records be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

Donald M. Sheraw
Clerk of the Court

The following excerpt is from the Chronology, referred to in the Petition herein, as having been before the Court of Appeals. The record references contained are to the files in the Article 78 proceeding or the underlying disciplinary proceeding, which Petitioner transmitted to the Court of Appeals to support her entitlement to Article 78 relief and review by that Court.

CHRONOLOGY

15. ...the Grievance Committee for the Ninth Judicial District [hereinafter "Grievance Committee"], on information and belief, rendered an ex parte report concerning DLS, which it thereafter filed with the Appellate Division, Second Department [hereinafter "Second Department"].

16. DLS has never seen such ex parte July 31, 1989 report, discovery of which has been consistently denied her by Mr. Casella, Chief Counsel for the Grievance Committee, and by the Second Department (Article 78: DLS' 7/2/93 Cross-Motion, ¶36; 11/19/93 Dism/S.Judg Motion, ¶23).

17. Upon information and belief, the ex parte July 31, 1989 report related to complaints by two former clients, arising out of fee disputes with DLS' law firm.

18. Said complaints, pending before the Grievance Committee since 1987 and 1988, had been controverted by DLS in all material respects (11/19/93 Dism/S.Judg Motion, Exh. "E" and "F"; Article 78: DLS' 7/2/93 Cross-Motion, ¶46)

19. The Grievance Committee never notified DLS of any intent to take disciplinary steps with respect to the aforesaid two complaints and never served her with pre-petition written charges or afforded her a pre-petition hearing, as 22 N.Y.C.R.R. §691.4(e)(4) and (f) require.

20. The nature of the complaints, as well as the chronology of their handling by the Grievance Committee and the Second Department, show no basis upon which the Grievance Committee could discard the pre-petition requirements under the exigency exception of

§691.4(e)(5) (Article 78: DLS' 7/2/93 Cross-Motion, ¶¶ 38-45).

21. Notwithstanding that under 22 N.Y.C.R.R. §691.4(k) disciplinary proceedings are to be given a preference by the court, it was not until more than four months later, on December 14, 1989 (Folder "D-1"), that the Second Department rendered an Order on the ex parte July 31, 1989 report.

34. ...by Order dated December 14, 1989 (Folder "D-1"), the Second Department issued an Order authorizing a disciplinary proceeding against DLS based on alleged "acts of professional misconduct set forth in the committee's report, dated July 31, 1989" and naming Gary Casella, Chief Counsel for the Grievance Committee, as prosecutor of the proceeding.

35. Said Order (Folder "D-1") did not allege that the ex parte July 31, 1989 committee report had recommended prosecution of DLS or that it had made any finding that DLS was guilty of alleged misconduct.

36. The December 14, 1989 Order (Folder "D-1") made no reference to 22 N.Y.C.R.R. §691.4 and made no findings that the Grievance Committee had complied with the provisions therein.

37. No copy of the December 14, 1989 Order, or of the papers on which it was based, was ever served upon DLS (11/19/93 Dism/S.Judg Motion, ¶85).

38. On February 8, 1990, DLS was personally served with a Notice of Petition and Petition dated February 6, 1990 (Exh. "C" to 11/19/93 Dism/S.Judg Motion). Said Petition was made entirely "upon information and belief"--including the allegation as to compliance with "Section 90 of the Judiciary Law and pursuant to Section 691.4 of the Rules Governing the Conduct of Attorneys".

39. No copy of the Second Department's December 14, 1989 Order or the July 31, 1989 committee report was attached to the February 6, 1990 Petition, which recited those documents in its jurisdictional allegations (11/19/93 Dism/S.Judg Motion, ¶¶22, 85).

40. On March 8, 1990, DLS, by her attorney, Eli Vigliano, Esq., served her Verified Answer, dated March 7, 1990 (Exh. "U" to 11/19/93 Dism/S.Judg Motion), which denied knowledge or information

sufficient to form a belief as to the December 14, 1989 Order (Folder "D-1") and the ex parte July 31, 1989 committee report, as well as to the Grievance Committee's compliance with Judiciary Law §90 and §691.4, alleged as jurisdictional allegations in the February 6, 1990 Petition.

41. DLS' Verified Answer further pleaded two complete affirmative defenses, including that DLS was "being made the subject of invidious, discriminatory, retaliatory, selective disciplinary action denying her, inter alia, the equal protection of the laws".

42. No allegation in the Grievance Committee's February 6, 1990 Petition or DLS' March 7, 1990 Verified Answer placed her medical condition in issue.

46. ...without any inquiry of DLS prior thereto as to either her medical condition or whether she was then representing clients, Mr. Casella procured an ex parte Order to Show Cause (Folder "D-2", Doc. 1)... Said Order to Show Cause, signed May 8, 1990, sought a court-ordered medical examination of DLS pursuant to §22 N.Y.C.R.R. §691.13(b)(1) to determine whether she was mentally incapacitated and to suspend her upon such determination.

47. Mr. Casella's Order to Show Cause (Folder "D-2", Doc. 1) was unsupported by the petition of the Grievance Committee called for in 22 N.Y.C.R.R. §691.13(b)(1), the rule provision upon which Mr. Casella relied, and failed to allege any authorization by the Grievance Committee for such application (Folder "D-4/5/6", Doc. 5).

48. Mr. Casella's Order to Show Cause (Folder "D-2", Doc. 1) did not seek relief under 22 N.Y.C.R.R. §691.13(c). It did not allege that DLS had placed her medical condition in issue in the disciplinary proceeding authorized by the February 6, 1990 Petition or that such February 6, 1990 Petition was an "underlying" proceeding. Nor did the Order to Show Cause direct service thereof on DLS' attorney of record for the February 6, 1990 Petition, Mr. Vigliano.

49. Although Mr. Casella's May 8, 1990 Order to Show Cause required personal service thereof upon DLS, it was not personally served upon her.

50. DLS opposed Mr. Casella's May 8, 1990 Order to Show Cause with a Cross-Motion (Folder "D-2", Doc. 2) to dismiss same for lack of personal and subject matter jurisdiction, stating that there was no showing by Mr. Casella that the Grievance Committee had authorized him to bring such application and that requisite pre-petition procedures had been followed (at p. 4).

51. DLS further sought dismissal based on "unconstitutional invidious selectivity", specifically requesting "a pre-disciplinary hearing" to establish the Grievance Committee's "continuous unending pattern of invidious selectivity" going back to its first disciplinary proceedings ever brought against her more than ten year earlier (Folder "D-2", Doc. 2, pp. 2, 6-9).

52. In support thereof, DLS pointed out that when those earlier proceedings had been transferred to the Appellate Division, First Department, it threw out, on summary judgment, seventeen of the twenty charges made therein against her, thereafter dismissing the remaining three charges in a November 18, 1981 Order, which gave DLS leave to seek sanctions against her prosecutors in the Second Department for their frivolous conduct (Folder "D-2", Doc. 2, p. 6).

53. DLS' complaint as to the constitutionally impermissible manner in which the Grievance Committee had prosecuted those earlier proceedings and the unethical conduct of it Chief Counsel, Assistant Counsel, and its Chairman was reflected by the November 18, 1981 Order, annexed to her papers in support of her Cross-Motion (File Folder "D-2", Doc. 4, Exh. "B").

54. Mr. Casella failed to present any proof that the Grievance Committee had authorized him to make the May 8, 1990 Order to Show Cause for DLS' suspension pursuant to 22 N.Y.C.R.R. §691.13(b)(1).

55. Although 22 N.Y.C.R.R. §691.4(k) requires disciplinary proceedings to be given a preference by the court, the Second Department did not adjudicate Mr. Casella's May 8, 1990 Order to Show Cause and DLS' Cross-Motion for four months, i.e., until October 18, 1990--the day before DLS was scheduled to argue the appeal in Castracan v. Colavita before the Appellate Division, Third Department.

60. The Second Department's brief October 18, 1990 Order (Folder "D-2") contained seven material errors:

(a) It mischaracterized DLS' Cross-Motion (Folder "D-2", Doc 2), which sought dismissal of Mr. Casella's May 8, 1990 Order to Show Cause, as seeking dismissal of a disciplinary proceeding authorized against her by a December 6, 1989 Order;

(b) There was no December 6, 1989 Order against DLS, but only a December 14, 1989 Order (Folder "D-1"), authorizing prosecution of the February 6, 1990 Petition (Exh. "U" to 11/19/93 Dim/.Judg Motion);

© DLS' Cross-Motion did not challenge personal jurisdiction in "the underlying disciplinary proceeding", but rather contested service of the May 8, 1990 Order to Show Cause (Folder "D-2", Doc. 2, pp. 2-3; Doc. 4, pp. 1-4).

(d) There was no "underlying disciplinary proceeding" to Mr. Casella's May 8, 1990 Order to Show Cause, the February 6, 1990 Petition being completely separate and unrelated;

(e) The Second Department's use of the same docket number, A.D. 90-00315, for its October 18, 1990 Order as had been assigned to the February 6, 1990 Petition made it appear that they were related. They were not;

(f) The Second Department's delegation to Mr. Casella, as DLS' prosecutor, of the court's authority to designate "qualified medical experts" was unauthorized by 22 N.Y.C.R.R. §691.13(b)(1);

(g) The Second Department's authorization to Mr. Casella to appoint a medical "expert" did not conform with 22 N.Y.C.R.R. §691.13(b)(1), which call for designation of "medical experts".

61. By Order dated November 1, 1990 (Folder "D-3")--eight months after issue had been joined on the February 6, 1990 Petition (Exh. "C" to 11/19/93 Dism/S.Judg Motion) by DLS' March 7, 1990 Verified Answer (Exh. "U" to 11/19/93 Dism/S.Judg Motion)--the Second Department appointed Max Galfunt as special referee for the February 6, 1990 Petition.

62. Thereafter, Mr. Casella and Referee Galfunt took no steps to proceed with the February 6, 1990 Petition.

63. As to the October 18, 1990 Order (Folder "D-2"), Mr. Casella failed to notify Mr. Vigliano of the name of the medical expert he had designated to examine DLS until December 17, 1990 (Folder "D-4/5/6", Doc. 6, ¶16). He and the doctor designated by him then refused to agree to any safeguards relative to such examination (Folder "D-4/5/6", Doc. 6, ¶18; Doc. 2, ¶14).

64. By letter dated January 10, 1991 (Folder "D-4/5/6", Doc. 2, Exh. "B"), Mr. Vigliano delineated several respects in which the October 18, 1990 Order was not authorized by 22 N.Y.C.R.R. §691.13(b)(1), the section invoked by Mr. Casella, and requested that the Grievance Committee stipulate to vacatur of the October 18, 1990 Order, absent which he stated he would make an application to the court.

65. Without addressing any of Mr. Vigliano's specific jurisdictional and legal objections, Mr. Casella responded, by letter dated January 15, 1991 (Folder "D-4/5/6", Doc. 2, Exh. "C"), that the Grievance Committee "does not and will not agree to voluntary vacatur".

66. Thereafter, both Mr. Casella and DLS obtained Orders to Show Cause. Mr. Casella's Order to Show Cause, signed January 25, 1991, (Folder "D-4/5/6", Doc. 1) was made pursuant to 22 N.Y.C.R.R. §691.4(l)(1)(I) to immediately suspend DLS for alleged "failure to

comply" with the October 18, 1990 Order. DLS' Order to how Cause, signed January 28, 1991, (Folder "D-4/5/6", Doc. 2) was for vacatur of the October 18, 1990 Order as jurisdictionally void, as well as in opposition to Mr. Casella's Order to Show Cause.

67. Mr. Casella's January 25, 1991 Order to Show Cause for suspension was unsupported by any petition by the Grievance Committee setting forth any charge, based on a finding, that DLS was guilty of "failing to comply". It was supported only by Mr. Casella's attorney's affirmation, which further failed to allege that the Grievance Committee had authorized his application (11/19/93 Dism/S.Judg Motion, ¶32).

68. Without addressing the jurisdictional issue, Mr. Casella's supporting affirmation now affirmatively represented (at ¶14), for the first time (cf. File "D-2", Doc. 1, Casella Aff. at ¶3), that the unrelated February 6, 1990 Petition was "an underlying disciplinary proceeding"--which statement Mr. Casella knew to be false--and additionally represented that prosecution of the February 6, 1990 Petition had been delayed as a result of DLS' alleged failure to comply--which he also knew to be false. Mr. Casella represented that this was an "equally as important reason" for DLS' immediate suspension.

69. Mr. Casella also used for his Order to Show Cause the same A.D. #90-00315 docket number as had been assigned to the February 6, 1990 Petition (File "D-4/5/6", Doc. 9, fn. 1; File "D-12/13", Doc. 1, DLS Aff, p.1). This was intended to further the deceit that his motion for DLS' suspension and the February 6, 1990 proceeding against her were related--which he knew was not the case.

70. DLS' January 28, 1991 Order to Show Cause and supporting papers (Folder "D-4/5/6", Doc. 2, 5, 6, 8, 9) vigorously denied and controverted Mr. Casella's conclusory and unsupported claim of DLS' "failure to comply" and showed that the Second Department's October 18, 1980 Order was not a "lawful demand", as 22 N.Y.C.R.R. §691.4(l)(1)(I) specifically requires.
Additionally DLS sought sanctions against Mr. Casella and an investigation of his unethical conduct.

71. Although under 22 N.Y.C.R.R. §691.4(k), disciplinary

proceedings are to be given a preference by the court, more than four months elapsed before the Second Department decided the aforesaid two motions and Mr. Casella's subsequent motion for sanctions against Mr. Vigliano.

72. By two Order dated June 12, 1991 ("D-4", "D-5"), the Second Department denied, without reasons, Mr. Vigliano's Order to Show Cause to vacate the October 18, 1990 Order and to discipline Mr. Casella ("D-4") and denied Mr. Casella's motion for sanctions against Mr. Vigliano, "with leave to renew upon a showing of continued frivolous conduct" ("D-5"). The Second Department did not identify what conduct by Mr. Vigliano it considered "frivolous"--and the record shows no such conduct.

73. Two days later, on June 14, 1991, with no stay for review by the Court of Appeal nor time allowed for compliance with the challenged October 18, 1990 Order, the Second Department issued it "interim" suspension Order granting Mr. Casella's Order to Show Cause, without any findings or statement of reasons therefor. Said Order ("D-6"), of which DLS was unaware until it was served upon her five day later, on June 19, 1991--the day before the last day to file an appeal to the Court of Appeals in Castracan v. Colavita. By that time, it had already been released to the press by the Second Department.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

9785N
C/rl

GUY JAMES MANGANO, P.J
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

90-00315 DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower,
a suspended attorney.
Grievance Committee for the Ninth
Judicial District, petitioner,
Doris L. Sassower, respondent.

Motion by the respondent, *inter alia*, (1) to vacate this court's decision and order dated June 14, 1991, suspending her from the practice of law based upon her failure to comply with the October 18, 1990, decision and order of this court, which directed that she be examined by a qualified medical expert to determine whether she is incapacitated from continuing to practice law, (2) to vacate the underlying decisions and orders of June 12, 1991, and October 18, 1990, respectively, as well as subsequent decisions and orders based thereon, (3) for an immediate disciplinary investigation of the petitioner's Chief Counsel, (4) for a stay of all disciplinary matters and proceedings pending the outcome of this motion, including appeals in unrelated litigation involving the respondent, and (5) for leave to appeal to the Court of Appeals in the event the instant application is denied.

Upon the papers filed in support of the motion and the papers filed in opposition thereto it is,

ORDERED that the motion is denied, with costs.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

July 31, 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

3186b
B/nl

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

90-00315

DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower, a suspended attorney.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

On the court's own motion, it is,

ORDERED that the decision and order of this court dated July 31, 1992, in the above-entitled case, is amended so as to provide for the payment by the respondent of $100 costs pursuant to CPLR 8202.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

November 12, 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT
8603b: B/em

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

90-00315 DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower,
a suspended attorney.

Grievance Committee for the Ninth
Judicial District, petitioner;

Doris L. Sassower, respondent.

Motion by the respondent, Doris L. Sassower, inter alia, for an order (1) granting reargument of this court's sua sponte order of November 12, 1992, amending its July 31, 1992 order and, upon reargument, vacating both the sua sponte November 12, 1992 order imposing $100 costs upon the respondent and July 31, 1992 order, so as to vacate the June 14, 1991 suspension order based on Matter of Russakoff, 72 NY2d 520; or, in the alternative, (2) directing an immediate post-suspension hearing as to the basis for the July 14, 1991 suspension order and certifying a question of law to the Court of Appeals.

Upon the papers filed in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that the motion is denied in its entirety, with $100 costs pursuant to CPLR 8202.

The respondent's papers fail to set forth a valid basis for reargument.

The duplicative and frivolous nature of the respondent's applications warrants the imposition of a further bill of costs in the sum of $100.

The respondent's request for oral argument is also denied.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:

April 22, 1993

Martin H. Brownstein/Clerk

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of November A.D. 1992

PRESENT, HON. RICHARD D. SIMONS, Acting Chief Judge, presiding.

Mo. No. 1208 SSD 99

In the Matter of Doris L. Sassower,
A Suspended Attorney.

Grievance Committee for the
Ninth Judicial District,

Respondent,

Doris L. Sassower,

Appellant.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution.

Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

6155N
B/nl

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
STANLEY HARWOOD, JJ.

90-00315 Atty. DECISION & ORDER

In the Matter of Doris L. Sassower,
a suspended attorney.

Grievance Committee for the Ninth
Judicial District, petitioner;

Doris L. Sassower, respondent.

By decision and order of this court dated December 14, 1989, the petitioner was ordered to institute and prosecute a disciplinary proceeding against the respondent. By further order of this court dated October 18, 1990, the petitioner's motion to direct the respondent to submit to an examination by a qualified medical expert in order to ascertain whether the respondent is incapacitated from the practice of law by reason of medical infirmity or illness, was granted. By order of this court dated June 14, 1991, the respondent was immediately suspended until further order of the court, resulting from her failure to comply with this court's order directing her to submit to a physical examination.

The petitioner now seeks leave to supplement the petition dated February 6, 1990, which is on file with this court, and to prosecute additional allegations based upon acts of professional misconduct which form the basis of *sua sponte* complaints pending with the petitioner.

ORDERED that the application is granted; and it is further,

ORDERED that the Grievance Committee for the Ninth Judicial District is hereby authorized to prosecute the additional allegations of professional misconduct as part of the disciplinary proceeding previously authorized by this court's order dated December 14, 1989. It is further directed that the petitioner serve the respondent with a supplemental petition within 20 days of this order and that the respondent shall serve an answer thereto within 10 days of her receipt of the supplemental petition.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and HARWOOD, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

April 1, 1992

State of New York Grievance Committee for the Ninth Judicial District

Edward I. Sumber
Chairman

Gary L. Casella
Chief Counsel

March 6, 1992

...

CONFIDENTIAL

RE: Matter of Doris L. Sassower
A Suspended Attorney

Dear Presiding Justice Mangano:

At its meeting held on February 27, 1992, the Grievance Committee for the Ninth Judicial District unanimously voted that application be made to this Court to hold in abeyance a disciplinary proceeding pending against Doris L. Sassower.

...

In addition, the Grievance Committee for the Ninth Judicial District has two pending sua sponte complaints. The first, as set forth above, authorized in June 1991, is based on the sanctions imposed by Justice Fredman. The second complaint, which was sent to respondent by letter dated July 5, 1991, alleges that respondent has been guilty of violating the Order of Suspension dated June 14, 1991, personally served on her on June 19, 1991, by permitting a Notice of Appeal to be filed on or about June 20, 1991, in the appeal of an election law suit in which she was appearing pro bono, to go out with the name Doris L. Sassower, P.C. on the blueback.

...

Respectfully submitted,
Gary Casella

GLC/meh
cc: Edward I. Sumber, Esq.
Chairman

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

3182b
B/nl

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

90-00315

DECISION & ORDER ON MOTIONS

In the Matter of Doris L. Sassower,
a suspended attorney.
Grievance Committee for the Ninth
Judicial District, petitioner;
Doris L. Sassower, respondent.

Motions by the respondent for an order: (1) striking the notice of supplemental petition and the supplemental petition dated June 26, 1992; (2) dismissing the petition and the supplemental petition and each and every charge thereof, individually and collectively, for lack of jurisdiction and for failure to state a cause of action pursuant to CPLR 3211(a); (3) vacating the two orders of this court, dated April 1. 1992, for lack of jurisdiction; (4) granting leave for disclosure/discovery pursuant to CPLR 408; (5) transferring this proceeding to another Judicial Department; and (6) directing an immediate disciplinary investigation of petitioner's Chief Counsel for his allegedly unethical and abusive practices.

Upon the papers filed in support of the motions and the papers filed in opposition thereto, it is

ORDERED that the motions are granted to the extent that the decision and order of this court, dated April 1, 1992, which authorized the petitioner to supplement its petition dated February 6, 1990, with additional allegations based upon acts of professional misconduct which

form the basis of sua sponte complaints pending with the petitioner, is vacated; and it is further,

ORDERED that the notice of supplemental petition and petition dated June 26, 1992 is stricken with leave to the petitioner to resubmit the charges; and it is further,

ORDERED that the respondent's motions are otherwise denied.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

November 12, 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

3181b
B/nl

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

90-00315

DECISION & ORDER ON APPLICATION

In the Matter of Doris L. Sassower, a suspended attorney.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

By decision and order of this court dated December 14, 1989, the petitioner Grievance Committee for the Ninth Judicial District was authorized to institute and prosecute a disciplinary proceeding against the respondent. By further order of this court dated October 18, 1990, the petitioner's motion to direct the respondent to submit to an examination by a qualified medical expert in order to ascertain whether the respondent is incapacitated from the practice of law by reason of mental infirmity or illness, was granted. By order of this court dated June 14, 1991, the respondent was immediately suspended from the practice of law until further order of the court, resulting from her failure to comply with this court's order directing her to submit to a physical examination. By order dated April 1, 1992, the court, inter alia, authorized the service of supplemental charges on the respondent. By order dated June 4, 1992, the matter was referred to the Hon. Max H. Galfunt, as Special Referee to hear and report. The petitioner now

applies for leave to prosecute additional allegations based upon acts of professional misconduct outlined in the Committee's report dated July 8, 1992.

ORDERED that the application is granted to the extent that the Grievance Committee for the Ninth Judicial District is authorized to institute and prosecute a separate disciplinary proceeding against the respondent, Doris L. Sassower, based on the charges set forth in the confidential memorandum, dated July 8, 1992; and it is further,

ORDERED that Gary L. Casella, Chief Counsel to the Grievance Committee for the Ninth Judicial District, 399 Knollwood Road, White Plains, NY 10603, is hereby appointed as attorney for the petitioner in such proceeding; and it is further,

ORDERED that the petitioner Grievance Committee shall serve upon the respondent, the Special Referee and file with this court a petition within ninety (90) days of receipt of this order; and it is further,

ORDERED that the respondent shall serve an answer to the petition upon the petitioner, the Special Referee and file same with this court within ten (10) days of his receipt of the petition; and it is further,

ORDERED that the issues raised by the petition and any answer thereto are referred to the Hon. Max H. Galfunt, a former Criminal Court Judge, 216 Beach 143rd Street, Neponsit, New York 11694, as Special Referee to hear and to report, together with his findings on the issues.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

November 12, 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

7582b
B/nl

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

90-00315 Atty.

DECISION & ORDER ON APPLICATION

In the Matter of Doris L. Sassower, a suspended attorney.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

By order of this court dated December 14, 1989, the Grievance Committee for the Ninth Judicial District was authorized to institute a disciplinary proceeding against Doris L. Sassower, as respondent. By order of November 1, 1990, the issues raised by the petition and answer were referred to the Hon. Max Galfunt, as Special Referee. By order of this court dated June 14, 1991, the respondent was suspended, until further order of the court, for failure to cooperate with the Grievance Committee. By further order of this Court dated November 12, 1992, the petitioner was authorized to institute and prosecute a separate disciplinary proceeding against respondent based upon acts of professional misconduct outlined in the Committee's report dated July 8, 1992. The petitioner now applies for leave to prosecute additional allegations based upon charges of professional misconduct outlined in the Committee's report dated December 17, 1992. The respondent was admitted to the Bar on December 5, 1955, at a term of the Appellate Division of the Supreme Court in the First Judicial Department.

ORDERED that the application is granted to the extent that the Grievance Committee for the Ninth Judicial District is hereby authorized to prosecute the three additional allegations of professional misconduct set forth in the supplemental petition dated June 26, 1992, as part of the disciplinary proceeding previously authorized by this court's order dated November 12, 1992; and it is further,

ORDERED that the issues raised by the supplemental petition and any answer thereto are referred to the Hon. Max Galfunt, as Special referee to hear and report, along with the charges previously referred to him.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

March 17, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

6153N
B/nl

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
STANLEY HARWOOD, JJ.

90-00315 Atty.

DECISION & ORDER ON APPLICATION

In the Matter of Doris L. Sassower, a suspended attorney.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

By decision and order of this court dated December 14, 1989, the petitioner was ordered to institute and prosecute a disciplinary proceeding against the respondent. By further order of this court dated October 18, 1990, the petitioner's motion to direct the respondent to submit to an examination by a qualified medical expert in order to ascertain whether the respondent is incapacitated from the practice of law by reason of mental infirmity or illness, was granted. By order of this court dated June 14, 1991, the respondent was immediately suspended until further order of this court, resulting from her failure to comply with this court's order directing her to submit to a psychiatric examination.

The petitioner now applies *ex parte* for an order holding the pending disciplinary proceeding in abeyance based upon the respondent's failure to submit to the court ordered psychiatric evaluation.

Upon the papers filed in support of the application, it is

ORDERED that the application is denied; and it is further,

ORDERED that the petitioner Grievance Committee is directed to proceed with the pending disciplinary proceeding during the course of which the respondent, should she be so inclined, may raise the issue of her alleged incapacity as a potential defense.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and HARWOOD, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

April 1, 1992

Transcript of April 8, 1993 Preliminary Conference, annexed as Exhibit "C" to Petitioner's cross-motion in the Article 78 proceeding

Ref: Referee Max Galfunt
DLS: Doris L. Sassower

pages 4-5

Ref: As I told you previously, sometime in February I received a call from the Appellate Division, who told me and directed me to forthwith proceed with this hearing on the petition of February 6, 1990.

...

DLS: Who called you, sir?

Ref: The Appellate Division.

DLS: Who in the Appellate Division?

Ref: Madam, I told you the Appellate Division. I don't have to report to you.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

0993T

(NOT TO BE PUBLISHED) B/nl

GUY J. MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
THOMAS R. SULLIVAN, JJ.

90-00315 Atty.

DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower, an attorney and counselor at law.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

Proceeding pursuant to statute (Judiciary Law §90) to discipline the respondent, Doris L. Sassower, an attorney and counselor-at-law, who was admitted to practice by the Appellate Division of the Supreme Court, First Judicial Department on December 5, 1955, under the name Doris Lipson Sassower.

Upon the papers filed in support of the application and the answer thereto, it is

ORDERED that the issues raised by the petition and respondent's answer are referred to Hon. Max H. Galfunt, a former Criminal Court Judge, 216 Beach 143rd Street, Neponsit, New York 11694, as Special Referee to hear and to report, together with his findings on the issues.

MANGANO, P.J., THOMPSON, BRACKEN, BROWN and SULLIVAN, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

November 1, 1990

THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

1359W

(NOT TO BE PUBLISHED) B/nl

MILTON MOLLEN, P.J.
GUY J. MANGANO
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN, JJ.

Motion No. 493 Atty. DECISION & ORDER ON APPLICATION

In the Matter of Doris L. Sassower,
an attorney and counselor at law.

Application by the Grievance Committee for the Ninth Judicial District pursuant to statute (Judiciary Law §90[7]) for leave to institute and prosecute a disciplinary proceeding in this court as petitioner against Doris L. Sassower, an attorney, who was admitted to practice by the Appellate Division, First Judicial Department on December 5, 1955, under the name Doris Lipson Sassower, for acts of professional misconduct alleged in the committee's report, dated July 31, 1989.

ORDERED that the application is granted; and it is further,

ORDERED that the Grievance Committee for the Ninth Judicial District is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against the said Doris L. Sassower based on the acts of professional misconduct set forth in the said committee's report; and it is further,

ORDERED that Gary L. Casella, Chief Counsel to the Grievance Committee for the Ninth Judicial District, 399 Knollwood Road, White Plains, New York 10603, is hereby appointed as attorney for the petitioner in such proceeding.

MOLLEN, P.J., MANGANO, THOMPSON, BRACKEN and SULLIVAN, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

December 14, 1989

Excerpts from the Transcript of the Hearing on the February 6, 1990 Petition, transmitted by Petitioner to the Court of Appeals to Support its Review of the Article 78 Proceeding

September 27, 1994

pages 215-218

DLS: Is it true you are a former Criminal Court judge?

Ref: Next.

DLS: I would like to know because it would be helpful to my understanding, to get clarification, because I am not experienced in the criminal law field.

Ref: Next.

DLS: I would be grateful if your Honor would tell me if that information is correct.

Ref: I don't know what that has to do with you.

DLS: I would like to know --

Ref: You would like to know a lot of things. When are you going to start your opening statement?

DLS: Am I not entitled to know the standard that is going to be applied here, the standard of proof, and whether my entitlement to exculpatory materials will be respected, and if it is, aren't I entitled to have a reasonable opportunity after I obtain such materials which I have to date not received?

It was my understanding that this request had to be made to you as the adjudicating officer and not to the Appellate Division, that you would rule on the discovery requests that I had and discovery denials that I experienced on the part of Mr. Casella.

I would like to know from you if that is erroneous or not because I don't pretend to have had any experience in this

subject matter.

Ref: Next question. When are you going to start your opening?

DLS: What is the standard? There are many threshold questions that have to be discussed.

Ref: At the appropriate time you make your objection and your motion. This is not the appropriate time.

DLS: I need to know, for example, if I am going to -- am I entitled to notice of what the standard is that is appropriate here in terms of proving your case against me?

Ref: The same rules of evidence apply as in any court.

DLS: Is it a quasi-criminal matter in your opinion?

Ref: No, it is not a quasi-criminal matter.

DLS: Is it strictly civil?

Ref: More or less.

Cas: It is.

DLS: Is it to be proven by clear and convincing evidence?

Ref: By a preponderance of evidence.

DLS: Not clear and convincing.

Ref: I just answered you.

DLS. Just preponderance of the evidence.

Ref: You know, Mrs. Sassower, your questions now amaze me because you are a competent and thorough counsel. You are familiar with trial.

DLS: This is not my field, your Honor.

Ref: Ma'am, do you want to let me finish or are you going to interrupt me all the time?

DLS: I beg your pardon. I didn't know I was interrupting.

Ref: I have answered your question, by a preponderance of the evidence, and you have tried many, many cases and you know the rules of evidence. You know what evidence is admissible and what evidence is not. Don't try to act like a neophyte in front of me because your reputation has preceded you as to how competent you are and how excellent an attorney you are, and I am serious about that. I am not trying to flatter you.

DLS: I appreciate that.

Transcript Excerpts from Hearing on the February 6, 1990 Petition

September 29, 1993

DLS: Doris L. Sassower
Ref: Respondent Referee Max Galfunt
Cas: Respondent Gary Casella,
Chief Counsel of the Grievance Committee
Sumber: Respondent Edward I. Sumber
Chairman of the Grievance Committee
1990-1994

page 495-506

DLS: How long have you been a member of the Disciplinary Committee of the Ninth Judicial District?

Sum: I have been a member of the Disciplinary Committee since November 1989

DLS: When did you become its chairman, Mr. Sumber?

Sum: November 1990.

DLS: Prior to your becoming a member in November 1989, had you been involved in disciplinary work of any kind?

Cas: Objection.

Ref: Objection sustained.

DLS: On what ground?

Ref: May I ask one question?

Ref: Were you appointed?

Sum: I was appointed by the Appellate Division, your Honor.

Ref: When were you appointed by the Appellate Division?

Sum: November 1989.

Ref: As a member?

Sum: As a member. In 1990 I was chairman.

Ref: Appointed by the Appellate Division?

Sum: That is correct, sir.

DLS. What qualifications did you have prior to your appointment by the Appellate Division to serve as a member of the Grievance Committee of the Ninth Judicial District?

Cas: Objection, your Honor.

Ref: Objection sustained.

...

DLS: Would you take the responses subject to connection, your Honor so that we can speed up things?

Ref: Ask your next question.

DLS: I would like to have an answer to the question.

...

DLS: Mr. Sumber, are there any special qualifications that are required for appointment by the Appellate Division as a member of the Grievance Committee?

Cas: Objection.

Ref: Objection sustained.

DLS: What are the qualifications of membership on the Committee?

Cas: Objection. The Appellate Division makes the appointment. It is their determination.

DLS: I object to that.

Ref: Next question.

DLS: I have a right to have responses from this witness.

Ref: I am ruling. You have your exception. Next question.

DLS: Are there no qualifications for appointment to membership on this committee?

Cas: Objection.

Ref: Objection sustained.

DLS: We start out that this is an adversary party I am examining. Mr. Casella did not see fit to call the Chairman of the Committee to establish the jurisdictional facts that are set forth in the petition signed by the chairman of the Committee.

...

Since Mr. Casella did not see fit to call the chairman, either the present chairman or former chairman, who did sign the petition where I challenged jurisdiction of the court over me for

disciplinary purposes as set forth in my Verified Answer -- I denied each and every one of the allegations contained in the jurisdictional paragraphs -- I don't know why there should not be a right on my part after I have subpoenaed this witness to elicit the information.

I am not leading him. I am letting him simply give me information so that I can understand, and so that this court can search out the truth behind the central issue that we have to address here, which is the right of this court to discipline me, the power that this court has over me.

Ref: I can't repeat it, but again I said you don't seem to want to understand, this court will not discipline you. It does not have the power or authority.

DLS: I am not talking about your Honor.

Ref: You used the word, the Court, and I am answering your question.

DLS: When I said the Court, I meant the Appellate Division.

...

DLS: The power of the Appellate Division to exercise disciplinary jurisdiction over me is very much in question.

Would you concede, Mr. Sumber -- you have been a member of the Committee since 1989 -- that jurisdiction is a threshold question in any such proceeding?

Cas: Objection, your Honor.

Ref: Objection sustained.

...

DLS: Can you set forth, preliminary to the questions I will be putting to you, what your duties are as a member of the Grievance Committee?

Cas: Objection, your Honor.

Ref: Objection sustained.

DLS: I would like to know what the duties are, Mr. Sumber, of a chairman of a Grievance Committee.

Cas: Objection, your Honor.

Ref: Objection sustained.

Cas: I would like to note for the record again that Ms. Sassower has repeatedly attacked the process in the Appellate Division and the Court of Appeals unsuccessfully. It has no place in this proceeding before your Honor.

Ref: That is why I am sustaining the objection.

DLS: I never had a hearing on the contentions I was raising concerning jurisdiction. It is now that time because the paragraphs of the petition, which this court is now for the first time hearing with actual evidence, testimony, live witnesses, with my presumed right to cross-examine such witnesses as are going to be involved in the prosecution of this matter. I have the right to have information as to the process. That is precisely what we are here to find out -- what was the process that resulted in my being the subject of a petition seeking disciplinary relief against me, which means to the fullest extent disbarment, and my right to prove my second complete defense, which is that I am the subject of invidious, discriminatory, retaliatory, selective disciplinary action, denying inter alia equal protection of the laws. Are you saying, your Honor, that I am not going to be allowed to inquire into that process?

Ref: If you ask your questions, you will find out. Ask your next question, Counselor.

DLS: I have to start somewhere, your Honor, and my thought was to lay a foundation for those questions by starting out with the duties and powers of members of the Grievance Committee and its chairmen, their responsibilities and obligations

I would like to know, Mr. Sumber, are the responsibilities and powers of the Grievance Committee

members set forth and its chairman set forth in any document other than the statutory provision or other rules? In other words, is there a document that specifically relates to the operating procedures to be followed by the Grievance Committee itself?

Cas: Objection, your Honor.

Ref: Objection sustained.

DLS: Once again Mr. Casella is trying to keep secret and suppress relevant information as to the process.

Ref: You have your exception, as I said. Next question.

DLS: How can I establish that the process did not follow constitutional requirements as well as normal and customary practices that are followed with other attorneys than myself if your Honor does not permit me to inquire into the procedures?

Mr. Sumber, as chairman of the Committee, would you agree that the safeguards set forth in Judiciary Law, Section 90, and in the Appellate Division Rules Governing the Conduct of Attorneys, are intended for the protection of the accused attorneys, as well as of the public?

Cas: Objection, your Honor.

Ref: Objection sustained.

DLS: I would like to have his view of the public interest that is to be served in bringing proceedings against accused attorneys.

Ref: Next question.

DLS: I want to establish that there is a duality of public interest involved, that it is not only to discipline wrongdoing attorneys, but also to protect attorneys unjustly accused of wrongdoing.

Ref: Next question.

...

DLS: Are you familiar with the normal and customary practice and procedures when complaints are filed against attorneys with the Grievance Committee?

Cas: Objection.

Ref: Objection sustained.

DLS: On what basis, your Honor?

Ref: Next question.

DLS: I am entitled to know the reason so that I can rectify if there is something objectionable about it--

Ref: Next question.

DLS: --in the form. I would like to know what the basis of the objection is.

Ref: Next question.

DLS: I would like to establish the normal practice. Let the record reflect once again I have been denied all discovery requested by me.

Ref: Just one moment. May I ask you one question?

DLS: Yes.

Ref: Are you using him for discovery purposes?

DLS: I have --

Ref: Can I get an answer?

DLS: I am trying to discover the truth.

Ref: No, that is not my question. You know what my question is. Are you trying to have a discovery through this witness?

DLS: I am trying to discover the truth. That is the purpose of a trial.

Ref: I didn't ask you that. I know the purpose of a trial. I am merely asking you a question whether or not you are using this witness for discovery purposes, to discover certain evidence in this trial.

DLS: To discover the facts.

Ref: Is that what you are using him for? Is that what you subpoenaed him for? To discover what?

DLS: To discover the facts in support of my defense and in refutation of the prosecution.

Ref: All right, is that your purpose?

DLS: I am entitled to do that, am I not?

Ref: That is wonderful. I think you are right; you are trying to use him for discovery purposes.

DLS: What do you mean by discovery. I have been denied before a hearing to have discovery. In any civil case you are usually allowed discovery.

Ref: I am agreeing with you, you want to use him for discovery.

DLS: I was denied discovery and no reason was given...

...

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DLS: Mr. Sumber, can you instruct your counsel [Respondent Casella] to produce the files as ordered by the court in the subpoena, which is so ordered.

Sum: Mrs. Sassower, I am a witness.

DLS: And you are here in your capacity as chairman of the Committee.

...

Ref: Mrs. Sassower, he stated this morning he doesn't have anything.

He stated it again this afternoon. How many times does he have to say it before you understand it?

DLS: Do you have access as chairman to the documents that are here [at the Grievance Committee]?

Cas: Objection.

Ref: Objection sustained. Next question.

DLS: Does the chairman have access to documents that are part of the files of the Grievance Committee?

Cas: Objection.

Ref: Objection sustained, asked and answered.

DLS: Is the answer no?

Ref: There is no answer. I sustain the objection.

...

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DLS: Have you ever seen the report of July 31, 1989?

Cas: Objection.

Ref: When did you become a member?

Sum: November 1989.

DLS: Did you ever see the report that was made, which is referred to in the petition in my case?

Cas: Objection, your Honor.

Ref: Objection overruled.

DLS: Did you ever see the report?

Sum: I may have. I don't recall ever having seen it.

Ref: That was his testimony all day long, that he may have seen some of these documents, but he doesn't recall.

...

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DLS: ...Mr. Casella is trying to have it both ways. He would like it so that Mr. Sumber knows nothing about anything so that I can't get answers to my questions. At the same time he would like it to be that he is actually fully familiar with everything. Now, which is it?

If you were to characterize your knowledge of the February 6, 1990 petition and the complaints underlying it...how would you describe your knowledge, as fully familiar or unfamiliar?

Cas: Is this true, false, multiple choice? Objection, your Honor.

Ref: Objection sustained.

DLS: I can't get an answer on anything.

Ref: Next question.

DLS: I have to get an answer from the witness as to the extent of his knowledge.

Ref: I have ruled on the objection.

...

Transcript Excerpts from Hearing on the February 6, 1990 Petition

January 11, 1994

DLS: Doris L. Sassower
Ref: Respondent Referee Max Galfunt
Cas: Respondent Gary Casella,
Chief Counsel of the Grievance Committee
Daly: William Daly, Esq.
Former Chairman of the Grievance Committee

pages 739-781

DLS: Could you state when you were a member of the Grievance Committee?

Daly: I was a member of the Committee for a period of eight years prior to 1989. I was the Chairman for approximately the last year of that eight-year period.

DLS: The last year or two years?

Daly: I believe it was approximately one year. It might have been thirteen months.

DLS: When did you cease being Chairman?

Daly: In the range of the fall of 1989.

DLS: Do you have any records that would refresh your recollection specifically so that you could state with accuracy the exact tenure of your membership on the Committee for the eight years that you have just referred to?

Cas: Your Honor, I object on the basis of relevance. The witness has given his recollection as to when he served.

DLS: Objection. This is very material.

Ref: Objection sustained. Next question.

DLS: I have a right to know precisely --

Ref: I have made my ruling.

DLS: I asked him if he had some documents to refresh his recollection...

Ref: Next question.

...

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DLS: In your experience for eight years as a member of the Committee, when for the first time did you become aware that I was the subject of any disciplinary proceeding?

Cas: Objection.

Ref: Objection sustained.

DLS: On what ground?

Ref: Next question, counselor.

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DLS: Can you set forth the procedures that are followed as a normal and customary practice in connection with grievance complaints to committees?

Cas: Objection

Ref: Objection sustained.

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DLS: I am asking for information from this witness in connection with an allegation in this petition, the first allegation of the petition signed by Mr. Geoghegan that --

Ref: Signed by whom?

DLS: The succeeding Chairman.

Ref: All right, fine, I understand you.

DLS: Based upon the acts of professional misconduct as set forth [in the report of] the Grievance Committee for the Ninth Judicial District, signed July 31, 1989 by --

Ref: Are you Mr. Geoghegan?

Daly: No, Sir.

DLS: Were you the Chairman at the time of July 31, 1989 when a report ostensibly signed by the Chairman of that Committee was filed with the Court? Were you Chairman --

Cas: Objection.

Ref: Objection sustained.

DLS: Were you Chairman of the Committee on July 31, 1989?

Cas: You already sustained that objection, Judge.

Ref: Next question.

DLS: Do you recall during your tenure as Chairman ever signing a report relating to a petition which the Grievance Committee was asking the court to authorize for prosecution against Doris L. Sassower?

Cas: Objection.

Ref: Sustained.

...

Cas: Mrs. Sassower has addressed these inquiries to the Appellate Division and it is improper for her to raise this inquiry in this proceeding.

DLS: That is not so. I would like Mr. Casella to document any question I ever posed to Mr. Daly --

Cas: The confidential report.

Ref: Sit down, Mr. Casella.

DLS: I am asking Mr. Daly to answer one question.

Did you sign the report dated July 31, 1989, which is stated to be the basis of the petition against Doris Sassower that has been brought by the Grievance Committee of the Ninth Judicial District?

Cas: Objection.

Ref: Sustained.

DLS: You are not allowing him to answer whether he signed it or not?

Ref: I have made my ruling.

DLS: Do you know who signed it if you didn't sign it?

Cas: Objection.

Ref: Objection sustained.

DLS: Did you ever see it?

Cas: Objection.

Ref: Objection sustained.

DLS: Did you ever, from July 31, 1989 until the end of your tenure, which you were unable to identify, ever know or were you ever informed as to what resulted from that report?

Cas: Objection.

Ref: Sustained.

DLS: In your practice as Chairman or as a member of the Committee, can you state what the normal and customary practice was in authorizing your counsel to proceed with prosecution of any given grievance complaint against an accused attorney?

Cas: Objection.

Ref: Objection sustained.

DLS: Do you know, Mr. Daly, whether any subcommittee was ever appointed with respect to the matter of Doris L. Sassower before disciplinary proceedings were authorized against her?

Cas: Objection.

Ref: Objection sustained.

DLS: Did you see at any time as Chairman or as a member of the Committee the complaints made...against Doris L. Sassower when they were in the grievance stage?

Cas: Objection.

Ref: Sustained. Next question.

DLS: Do you know what was the basis of the report and recommendation, or was there a recommendation made during your tenure for prosecution against Doris Sassower of disciplinary proceedings in the court?

Cas: Objection.

Ref: Objection sustained.

DLS: Did you know, Mr. Daly, anything about the credentials of Doris Sassower before disciplinary prosecution was authorized?

Cas: Objection.

Ref: Sustained.

DLS: On what basis, your Honor.

Ref: Next question.

DLS: Mr. Casella only has to object and you sustain it?

Ref: Next question.

DLS: Were you aware, Mr. Daly, that at the time prosecution was allegedly authorized on the basis of a report allegedly signed by you that Doris Sassower had --

Ref: You are asking a question about a report he signed. Do you have it?

DLS: No, I have not been allowed to see it.

Ref: Then how can ask him a question about something you know nothing about? Is his name on it?

...

DLS: The petitioner [Grievance Committee's February 6, 1990 disciplinary petition] in paragraph 7 states the source of petitioner's knowledge and the grounds for its belief are the facts in evidence as set forth in the report of the Grievance Committee for the Ninth Judicial District filed with the Appellate Division, Second Department.

Mr. Daly, what facts were in evidence since there was no hearing ever accorded to Doris Sassower before any subcommittee of the Grievance Committee? How could there be any evidence? What is the evidence referred to?

Cas: Objection.

Ref: Objection sustained. Next question.

DLS: Is it your experience in authorizing disciplinary proceedings against an attorney who controverts all of the material allegations of the complaint, documents the facts in support of her denials, that without any hearing, an attorney with an

unblemished disciplinary record will not have an opportunity to be heard with respect to a proposed disciplinary proceeding? Is that the standard that the Grievance Committee for the Ninth Judicial District follows as a general practice, the normal and customary procedure under your tenure? Is that the practice that was employed?

Cas: Objection, your Honor.

Ref: Objection sustained. Next question.

DLS: Mr. Daly, are you familiar with any responses that I provided to the Committee which were addressed to the Chief Counsel, Mr. Casella? Are you familiar with the voluminous documentation that I provided to establish that there was no basis for the complaints at all, and that they should be dismissed summarily, and that if there was any question, further question remaining after reading my responses and documentation, that I would be happy to cooperate upon notification that my responses were inadequate in any way, shape or form, and that I had never received any notice --

Ref: That is one question?

DLS: Yes --
--from 1988 through your report or the report of the petitioner dated July 31, 1989?

Cas: In addition to my objection, I will note again Mrs. Sassower has made these arguments repeatedly to the Appellate Division unsuccessfully.

DLS: That is not true. That is an outrageous--

...

Cas: I renew my motion to quash the subpoena and excuse Mr. Daly.

DLS: Mr. Casella knows full well that if this witness were allowed to testify to the true facts, they would expose Mr. Casella as totally dishonest and unethical in that he suppressed the true facts from the Committee, and if they had known the true facts, it is hard to believe that they would not have dismissed the

complaints, not to mention the other alternatives that are offered under the rules short of disciplinary proceedings being authorized.

I would like to point out that Mr. Casella has now been guilty of another deliberate mistruth by suggesting that in any way I am precluded from examining into these matters by any order of the Appellate Division.

The order of the Appellate Division stated specifically that I have my rights in the disciplinary proceeding... And I will give your Honor when you come back from the lunch recess the copy of the order which was made by the Appellate Division, dated September 20, 1993, on my Article 78 proceeding against the Appellate Division, Second Department, Presiding Justice Mangano being the first named respondent and your Honor, Mr Sumber as Chairman and Mr. Casella as being the other respondents.

That order states clearly that the reason I do not have my remedies in an Article 78 proceeding to prevent this travesty of justice from continuing to consume taxpayers' money is because I will have my opportunity at some future time in the disciplinary proceedings themselves to make known the facts as to the total lack of jurisdiction, because there never was any compliance with pre-petition procedures which are required by the rules of the Appellate Division, Second Department themselves before any jurisdiction can be had.

The failure of Mr. Casella to observe those requirements has vitiated these proceedings as well as every other disciplinary proceeding that has been brought against me, and in fact Mr. Daly was --

Ref: How much longer are you going to make a speech?

DLS: I informed Mr. Daly for the record of my position with respect to these matters and not only authorized him --

Ref: I asked you a question: How much longer will you be?

DLS: I implored him to review the files so that he could assist in preventing this fraudulent deceit upon the court, deceit beyond any standard of justice, from being perpetuated.

Unfortunately, it is apparent that was not done, but I am going to state for the record that Mr. Daly is so authorized, and I am inviting him to make whatever use of that authorization during his lunch period so that he can review the report that is the supposed basis of this disciplinary proceeding to verify whether or not indeed he did sign it, or if his name, if it appears to be on the document, if it does, is indeed his signature.

It may be that he does not truly know anything about it because it may be he never did see it or authorize that prosection as Chairman of the Committee.

I submit respectfully, Judge, that I have a right as the accused attorney whose license and livelihood has been taken away for the past more than two and a half years unjustly, without a shred of due process, I submit I have a right to prove it now, what has taken place here.

Cas: I move to quash the subpoena and permit Mr. Daly to be excused.

Ref: That motion is granted. Mr. Daly is being used as an EBT. This is not the place for an EBT. Mr. Daly, you are excused.

...

DLS: I move to dismiss this petition because there is no jurisdiction shown to exist. Mr. Daly has not even been allowed to identify whether or not he signed it, and who signed it, even though he has admitted he was Chairman on July 31, 1989.

Ref: Ms. Sassower, this hearing is being held pursuant to an order of the Appellate Division, which granted me the right to have a hearing on this matter.

DLS: As I said, the Appellate Division -- you are very selectively applying the orders of the Appellate Division.

Ref: No.

DLS: The order of September 20, 1993 -- and I asked that it be marked so that there is no question that you have seen it --

...

DLS: And I quote the decision: "Jurisdictional challenge can be addressed in the underlying disciplinary proceeding." This is the disciplinary proceeding which was underlying my Article 78 proceeding, and I have a right to establish that there was no jurisdiction since you have not seen fit to require Mr. Casella to establish he has jurisdiction even though I contested it.

I was informed that Mr. Daly signed this [July 31, 1989] report. Mr. Daly stated to me that he does not even know the meaning of the word 'report'. No one except he can verify it...

...

I want to know whether his name was affixed fraudulently, whether it was placed there without his knowledge; I have a right to know the authenticity of that report.

Ref: Recess for lunch to 2 o'clock.

...

DLS: Mr. Daly, would you please set forth what took place following your leaving the witness stand from beginning to end...relative to the July 31, 1989 report that is referred to in the petition, which is the subject of these hearings?

Would you kindly state for the record what transpired when you left the stand?

Cas: If I may, Mrs. Sassower has made applications to the Appellate Division unsuccessfully for access to that confidential report.

Ref: Wait a minute.

Cas I want to put this on the record.

Ref: Go ahead.

Cas: Mrs. Sassower is going to attempt to get access to that report,

which she is not entitled to, and that is why we will not release it to Mr. Daly because Mrs. Sassower is not entitled to it.

Ref: Mr. Daly, did you see that report?

Cas: Mrs. Sassower told Mr. Daly he should ask me to see the report.

Ref: Is that correct?

Daly: I believe I can clarify it, your Honor.

Ref: I kept you here, Mr. Daly, and I want you to make the statement, whatever you have.

Daly: After I was excused, Mrs. Sassower asked me if I would remain and look at the report and identify my signature. I indicated to her that I would ask Mr. Casella if he would make the report available to me. I spoke to Mr. Casella privately, and he advised me of the history of the effort to take custody of this report, and that because of prior rulings of the court, he would not consent to my seeing the report.

Ref: Thank you, Mr. Daly.

DLS: Your Honor, I would like to discuss this further.

Ref: Fine. You will discuss it outside after the hearing. I excused him. I only called him back for that one incident.

DLS: What other rulings did Mr. Casella show you--

Ref: You are not under oath any more, Mr. Daly. You are not a witness.

DLS: Did Mr. Casella show you anything to establish that you had no right, after my waiver of confidentiality to have access to that report, Mr. Daly?

Cas: Objection, your Honor.
Ref: You are excused, Mr. Daly.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

75960
Z/nl

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JJ.

90-00315

DECISION & ORDER ON MOTION

In the Matter of Doris L. Sassower, a suspended attorney.

Grievance Committee for the Ninth Judicial District, petitioner;

Doris L. Sassower, respondent.

Motion by the respondent, inter alia, (1) to recuse all the Justices of this court and for transfer of this matter to another Judicial Department, (2) to dismiss the supplemental petition, dated March 25, 1993, and the petition, dated January 28, 1993, on various stated grounds, (3) for an award of costs and sanctions against petitioner pursuant to 22 NYCRR 130.1-1 for the institution and prosecution of frivolous disciplinary proceedings, (4) for discovery of the petitioner's July 31, 1989, July 8, 1992, and December 17 1992, Grievance Committee reports and all other documents which may aid the respondent's defense or materially affect the outcome of the proceeding, (5) for a severance of all unrelated charges, and (6) for appointment of a Special Referee to investigate and report with respect to the respondent's complaints of "prosecutorial judicial misconduct."

Upon the papers filed in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that the motion is denied in its entirety; and it is further,

ORDERED that on the court's own motion, the respondent is directed to submit written answers to the petition, dated January 28, 1993, and the supplemental petition dated March 25, 1993, by February 18, 1994; and it is further,

ORDERED that no further extensions of time will be granted to the respondent with respect to her time to answer the petition and supplemental petition; and it is further,

ORDERED that in the event the respondent fails to timely answer the petition and supplemental petition, the petitioner is directed to forthwith move to impose discipline upon her default; and it is further,

ORDERED that the respondent is enjoined from making any further motions in this court in the pending disciplinary proceeding, without leave of a Justice of this court, with the exception of a motion to confirm or disaffirm the report of the Special Referee; applications for leave shall be made by letter addressed to the Clerk of the court, to which shall be attached the proposed motion papers, and shall be delivered to the Clerk for assignment of a Justice to determine the application for leave; no more than one application for leave shall be made with respect to any motion; and it is further,

ORDERED that the making of any motion without leave, or the making of multiple applications for leave with respect to any one motion shall be punishable as a criminal contempt of court pursuant to Judiciary Law §750(A)(3).

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

January 28, 1994

March 14, 1994 letter of Evan Schwartz, Esq. to the Court of Appeals in support of Jurisdictional Statement

Re: Sassower v. Mangano, et al.

. . .

I represent Petitioner-Appellant [hereinafter "Appellant"] in the above-entitled direct appeal and submit this letter in response to your sua sponte jurisdictional inquiry pursuant to 22 NYCRR 500.3, as well as in response to the sparse and conclusory opposition letter dated February 11, 1994, submitted by the Attorney General on behalf of the Respondents-Respondents [hereinafter "Respondents"].

This letter is intended to supplement, not supersede, Appellant's extensive Jurisdictional Statement, already submitted, establishing that jurisdiction of this appeal should be retained because (1) requisite finality has been achieved by the Second Department's dismissal of the Article 78 proceeding "on the merits" by the final judgment dated September 20, 1993 (Juris Stmnt, Exh A, hereinafter "the Judgment"), finally determining the rights of the parties to such special proceeding (CPLR 5011), and (2) substantial questions exist concerning the constitutionality of Judiciary Law §90 and 22 NYCRR 691.4, et seq. (Rules Governing the Conduct of Attorneys), particularly as it has been applied to Appellant in disciplinary proceedings against her brought thereunder by Respondents.

Such constitutional questions arise from the nature and extent of the abuses detailed in Appellant's papers in her instant Article 78 proceeding and the underlying disciplinary proceedings under A.D. 90-00315. Those papers show clearly and unequivocally that Appellant has been denied due process and equal protection afforded by those statutory and rule provisions, the Federal and State Constitutions[1], and

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[1] The constitutional issues were raised in the Appellate Division, Second Department, the originating court in this proceeding (Petition ¶¶7, 14; Pet's Mem of Law in Opp to Mot to Dismiss and in Supp of Cross-Mot, at 4-6, 11-13), and throughout the underlying proceedings.

controlling decisions of this Court, reflected in Matter of Nuey, 61 N.Y.2d 513 (1984) and Matter of Russakoff, 72 N.Y.2D 520 (1992).

Contrary to such provisions and decisional law, the record establishes that Appellant has been subjected to an on-going barrage of jurisdictionally-void disciplinary proceedings, even while she has been suspended under a similarly jurisdiction-less so-called "interim" suspension Order entered on June 14, 1991 (Juris Stmnt, Exh D-6), containing no findings or reasons, and suspending her from the practice of law immediately, indefinitely and unconditionally. The record shows that Respondents have deliberately and invidiously perpetuated that "interim" suspension for nearly three years, consistently denying, without reasons (Juris Stmnt, Exhs D-7, D-12, D-19), Appellant's motions to vacate as well as to grant the "prompt" post-suspension hearing to which she is constitutionally entitled (Juris Stmnt ¶¶19-21, 27: Point II).

Notwithstanding that Appellant is already suspended and thus deprived of the right to vindicate herself at a constitutionally-mandated hearing as to the alleged basis for her suspension, which was purportedly her "non-cooperation" with an order directing her to me medically examined (Juris Stmnt, Exh D-2)[2], Respondents have simultaneously generated and prosecuted additional jurisdictionally-void disciplinary proceedings based on their own factually and legally

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[2] That Order, dated October 18, 1990, is discussed at footnote 10 of the Jurisdictional Statement. Amplification of the extraordinary number and nature of the pivotal errors contained in such order are set forth at paragraph 30 of Appellant's November 19, 1993 Dismissal/Summary Judgment motion. Said motion is referred to at footnote 7 of the Jurisdictional Statement and was transmitted to this Court for consideration as part of this sua sponte jurisdictional inquiry (See Supplemental Exhibits submitted separately as part of this letter [hereinafter "Supp. Exhs"], Supp Exh 1).

baseless sua sponte complaints[3]. These malicious actions have caused Appellant to suffer the burden and astronomical defense costs of such proceeding, even while she has been thus deprived of her livelihood by the unjustified and unconstitutional interruption of her professional license.

The record further shows that Respondents have used the confidentiality provision of Judiciary Law §90(10) -- intended for the benefit of the accused attorney -- to mask the jurisdiction-less nature of their conduct by withholding from Appellant the Grievance Committee reports on which Respondent Second Department's orders authorizing prosecution of three separate disciplinary proceedings are allegedly based (Juris Stmnt, Exhs D-1, D-15, D-16). The overwhelming evidence, uncontroverted by Respondents, shows that the Committee reports made no "probable cause" finding, as specifically required by the Appellate Division's own Rules Governing the Conduct of Attorneys (22 NYCRR 691.4(e)(4); (f) and (h) before any disciplinary proceeding can be commenced, but, instead, consist entirely of hearsay and unsubstantiated accusations[4]. In the case of the June 14, 1991 "interim" order of suspension based on her alleged "non-cooperation" (Juris Stmnt, Exh. D-6) and the prior October 18, 1990 order directing her to submit to a medical examination (id., Exh D-2), there is not even a committee report preceding such orders making any evidentiary findings required -- an undisputed fact highlighted by the lack of any notice of petition and petition underlying Respondent Casella's motions for

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[3] Concise discussion of these sua sponte complaints and the disciplinary prosecution authorized thereon can be found in Appellant's November 19, 1993 Dismissal/Summary Judgment motion in the underlying proceeding (inter alia, at ¶¶45-46, 66-69).

[4] See Appellant's November 19, 1993 Dismissal/Summary Judgment motion, infra, ¶¶13-14, 16-27, 73-75; see also Appellant's Cross-Motion in the Article 78 proceeding, at 17-24.

Appellant's suspension and for her court-ordered medical examination[5].

There is no statutory provision for an order of suspension under such circumstances -- or for any of the other 19 orders under A.D. 90-00315, annexed as Exhibit D to Appellant's Jurisdictional Statement -- all of which are jurisdictionally void ab initio.

In the just decided case Matter of Catterson, N.Y.L.J., 3/11/1994, at 24, col. 3, Respondent Second Department, by a panel comprised of four of the same justices who dismissed Appellant's Article 78 proceeding at bar[6], found a "clear right to relief" by prohibition where an order -- in that case a discovery order -- was without statutory basis. Such decision contrasts starkly with its decision in this case, where they denied Appellant her "clear right" to such relief -- notwithstanding the file of the underlying disciplinary proceeding under A.D. 90-00315 establishes that each and every order therein is without factual or legal basis, statutory or otherwise. This includes the still extant June 14, 1991 "interim" suspension Order (Juris Stmnt, Exh D-6). That Respondent Second Department would grant the extraordinary remedy of prohibition in Matter of Catterson, but deny it here can only be seen as the latest expression of that Court's retaliatory double standard of adjudication where Appellant is concerned, all denying her due process and equal protection of the laws.

This Court has personal knowledge that Appellant has been a leading spokesperson against the increasing politicization of the bench

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[5] See Appellant's November 19, 1993 Dismissal/Summary Judgment Motion, infra, ¶¶29, 32.

[6] Those justices being Justices Thompson, Sullivan, Balletta and Rosenblatt.

and that, as pro bono counsel to a public interest group, she brought such issues to the fore by litigation in 1990 challenging judicial cross-endorsement deals by the major political parties and judicial nominating conventions conducted in violation of the Election Law[7]. Since examination of the disciplinary files under A.D. #90-00315 reveals no factual or legal basis for the steady continuum of jurisdiction-less orders (Juris Stmnt, Exh D), Respondents' retaliation against Appellant becomes apparent and unmistakable. Indeed, that contention was set forth by Appellant in the underlying proceedings under A.D. 90-00315, inter alia, immediately following her June 14, 1991 suspension, as part of her June 20, 1991 Order to Show Cause brought before Respondent Second Department to vacate the "interim" suspension Order[8] issued six days earlier.

The constitutional issues raised by this case thus take on First Amendment dimensions Since the Appellate Divisions control all aspects of the disciplinary mechanism, encompassing not only control of the judicial function, but, as well, the prosecutorial and administrative quasi-judicial functions through at-will appointments of those involved in such functions, the disciplinary mechanism can, as here, be triggered, sua sponte, by the behind-the-scenes manipulation of such at-will appointees (Juris Stmnt ¶27: Point III). This permits the Appellate Divisions to employ the disciplinary machinery to discredit and destroy "whistleblowers" in the legal profession who speak up about corruption

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[7] See Castracan v. Colavita, 173 A.D.2d 924 (3rd Dept), appeal dismissed 78 N.Y.2d 1041 (N.Y. 1991), and the companion case Sady v. Murphy, 175 A.D.2d 895 (2d Dept), lv denied 78 N.Y.2d 960 (N.Y. 1991), which were both before this Court during the same time as Appellant's motion for leave to appeal from the June 14, 1991 "interim" suspension Order, which motion was denied. Matter of Sassower, 80 N.Y.2d 1023 (1992).

[8] Appellant's Supporting Affid, at ¶¶12-14, wherein, inter alia, she stated that "...it is not my medical [condition], but rather my activities as pro bono counsel for the Ninth Judicial Committee that have resulted in the [suspension] order -- swift retribution for the opinions expressed...."

and incompetence in the courts. As has happened here, the confidentiality afforded under Judiciary Law §90(10) is then employed not as a shield to protect an unfairly accused attorney -- in conformity with legislative intent -- but as a sword against such attorney to conceal retaliation by its abrogation of mandated due process procedures.

That the structure of the disciplinary process permits judicial manipulation against lawyers who speak out impinges not only on a lawyer's First Amendment right of free speech, but the special duty imposed upon lawyers to "assist in maintaining the integrity and competence of the legal profession" (Canon 1 of the Code of Professional Responsibility) and to "assist in improving the legal system" (Canon 8, id.). Such ethical obligations are reflected in the Code adopted by the New York State Bar Association, as well as comparable provisions of the American Bar Association's Model Rules of Professional Conduct (Rule 8.2). Both Codes include specific provisions regarding the duty to report judicial misconduct (NY Rule DR 1-103; ABA Rule 8.3(b)).

Thus, the sweeping constitutional issues here presented impact not only upon the legal community, which is personally threatened by a disciplinary mechanism that denies them constitutional rights and lends itself to illegitimate retaliatory purposes, but upon the public at large, which depends upon lawyers "as guardians of the law"[9] to safeguard the integrity of the judicial process by speaking out against abuses of the legal process by judges.

The Legislature has provided the statutory Article 78 vehicle to protect citizens against whom judges have acted in a constitutionally unauthorized and prohibited manner. Such vehicle substantively codified the three historic remedies of certiorari to review, mandamus, and prohibition, which were part of our common law heritage before New York achieved statehood. 23 Carmody-Wait 2d §145:1 (1968 ed).

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[9] Preamble to the Code of Professional Responsibility.

The purpose of the original writ of certiorari was to provide citizens with an independent, impartial review by a superior court of gross abuse by an inferior court, as well as by inferior officers, boards or tribunals, acting in a judicial or quasi-judicial capacity. Op cit., at §145:5.

Yet, this case shows that the Article 78 proceeding, here pursued by Appellant, has been corrupted by Respondent Second Department's refusal to recognize that it could not "review" its own conduct with the independence and impartiality required for all adjudications. Code of Judicial Conduct, Canons 1-3. By its denial of Appellant's motion for recusal and transfer -- an obligation it should have recognized sua sponte --and its adjudication of the legality of its own challenged conduct, Respondent Second Department not only violated the fundamental precept governing all proceedings, to wit, "...no man can be a judge in his own case..." Aetna Life Ins. v. Lavoie, 475 U.S. 813, 822 (1985), citing In Re Murchison, 349 U.S. 133, 136, (1955), but was contemptuous of the very purpose and genesis of the historical Article 78 remedy -- to provide independent, impartial review by a higher court (Juris Stmnt ¶25).

As detailed in Appellant's Jurisdictional Statement (at ¶¶12-13, 20, 24, 27: Point I), the end-product of Respondent Second Department's self-interest in the outcome of the proceeding it adjudicated -- the Judgment appealed from -- flies in the face of controlling adjudicatory standards, decisional law, and the factual record. Such Judgment demonstrates the actual bias, presumed from the self-interest of the justices who rendered it.

Appellant's Jurisdictional Statement argued (at ¶10) that jurisdiction of this Court is mandated in an appeal from a judgment of the Appellate Division where, as here, it is acting as a court of first instance in an Article 78 proceeding. Notably, that contention is not even controverted by the Attorney General's Office

This proposition. set forth as a positive principle in two major treatises, Carmody-Wait 2d and New York Jurisprudence, quoted from and relied upon in the Jurisdictional Statement (¶10), flows logically from the public policy articulated by our Legislature recognizing "the right of suitors to one appeal." 10 Carmody-Wait 2d §70:4 (1992 ed.).

Under CPLR 506(a) and 7804(b), the required venue of an Article 78 proceeding against a lower court judge is the Supreme Court, and the right to appellate review by the Appellate Division from a judgement therein is automatic. CPLR 5701(a). On such appeal, the scope of review by the Appellate Division includes questions of

bothlaw and fact. CPLR 5501(c).

Under CPLR 506(b)(1), the required venue of an Article 78 proceeding against a Supreme Court justice is the Appellate Division. In such case, were there to be no correlative automatic right of appellate review to the Court of Appeals from a judgment of the Appellate Division in an Article 78 proceeding against Appellate Division justices, an anomalous situation would be presented. A citizen aggrieved by the abusive conduct of Supreme Court justices would be denied appellate review equal to that afforded a citizen aggrieved by the misconduct of lower court judges. Supreme Court justices would thus be accorded preferential status not afforded to lower court judges or other public bodies or officials, whose unlawful conduct, similarly challenged in Article 78 proceedings, is subject to a statutorily guaranteed scrutiny by a higher court as to both the law and the facts. No rational basis exists for such a distinction.

The legislative scheme laid out in CPLR 506(b)(1), deriving from the historic origin of common law writs, contemplates that an Article 78 proceeding against judges will be brought in a higher tribunal. In the case of lower court judges, the required venue is in the Supreme Court. In the case of Supreme Court justices, the required venue is the Appellate Division. However, there is no provision in the CPLR specifically defining the venue of Article 78 proceedings brought against Appellate Division justices. By analogy, the venue for such proceedings should be in the Court of Appeals, which would call upon it to exercise original jurisdiction for such purposes. Research does not reveal any decisional law on the subject, which appears to be "uncharted territory", in dire need of charting by this Court.

Certainly, if the Court of Appeals had the right at common law to review determinations by Appellate Division justices involving the judicial conduct of Supreme Court justices or Appellate Division justices on a writ of certiorari, nothing in CPLR Article 78 provisions takes that right away.

The legislative evolution of the statutory provisions of Article 78 of the CPLR shows that they were:

> intended only to reform the procedure for obtaining relief under the former practice of writs, leaving the relief available coextensive with that which previously existed except where specifically changed by statute

23 Carmody-Wait 2d, §145:3, at 427 (1968 ed.).

Thus, even were this Court precluded from exercising original jurisdiction over such Article 78 proceedings to review complained-of determinations of Appellate Division or other Supreme Court justices, jurisdiction by this Court to review same should be construed to lie as of right, as stated in the treatises, with the scope of review being the same de novo review of the facts, as well as of the law, as that empowered to the Appellate Divisions by CPLR 5501(c) when they review Supreme Court determinations of Article 78 proceedings challenging the conduct of lower court judges pursuant to CPLR 506 (b)(1). To hold otherwise would create a conflict between Article VI, §3(b) of the New York State Constitution defining this Court's jurisdiction (and statutory codification thereof in CPLR 5601(b), and the Equal Protection Clause of the 14th Amendment to the United States Constitution and the comparable provision contained in Article I, §11 of the New York State Constitution -- a conflict in need of prompt resolution by this Court . . .

No. 94-1546

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In the Matter of DORIS L. SASSOWER,

Petitioner,

—against—

HON. GUY MANGANO, as Presiding Justice of the Appellate Division, Second Department, HON. MAX GALFUNT, as Special Referee, and EDWARD SUMBER and GARY CASELLA, as Chairman and Chief Counsel, respectively of the Grievance Committee for the Ninth Judicial District,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

MEMORANDUM IN OPPOSITION

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

MEMORANDUM IN OPPOSITION

Petitioner, an attorney, commenced this proceeding under Article 78 of the New York Civil Practice Law and Rules (the "CPLR") seeking to prohibit further prosecution of a disciplinary proceeding against her for alleged acts of professional misconduct. By decision, order and judgment (one paper) dated September 20, 1993, the Supreme Court of the State of New York, Appellate Division, Second Department, granted respondents' motion to dismiss the petition and denied petitioner's cross-motion for summary judgment and other relief.

A. 20.[1] By order dated May 12, 1994, the New York State Court of Appeals dismissed, *sua sponte*, on jurisdictional grounds, petitioner's appeal as of right pursuant to CPLR § 5601. A. 22. Petitioner then moved in the Court of Appeals for reconsideration and for leave to appeal. By order dated September 29, 1994, the Court of Appeals denied both of those motions. A. 22.

Petitioner now seeks certiorari to determine "[w]hether New York's attorney disciplinary law [New York State Judiciary Law § 90] is unconstitutional, as written and applied." Petition for certiorari at "Questions Presented." The petition for certiorari should be denied.

The Appellate Division based its dismissal of petitioner's Article 78 proceeding exclusively upon an adequate and independent state ground unrelated to the constitutional question petitioner now raises. Applying well-settled New York law, the Appellate Division stated:

> The remedy of prohibition is available only where there is a clear legal right and, in instances where judicial authority is challenged, only when a court acts or threatens to act either without jurisdiction or in excess of its authorized powers (*see*, *Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 569 [, 528 N.Y.S.2d 21, 24 (1988)]).

A. 21.

The Appellate Division also followed clear New York law in concluding that the extraordinary remedy of prohibition does not lie where, as here, petitioner has an adequate remedy at law. *Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 147 (1983). Because petitioner's jurisdictional challenge to her disciplinary proceeding could be addressed in that proceeding itself or by motion to confirm or disaffirm a referee's report, the Appellate Division correctly decided that "petitioner

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[1] References in the form "A. __" are to the appendix to the petition for certiorari.

is not entitled to the extraordinary remedy of prohibition." A. 21.

When a state court decision rests on adequate and independent state grounds, this Court does not have jurisdiction to review it. *Sochor v. Florida*, 112 S.Ct. 2114, 2119 (1992). Since the Appellate Division's decision, order and judgment is based solely on such grounds, the petition for a writ of certiorari should be denied.[2]

Dated: New York, New York
April 10, 1995

Respectfully submitted,

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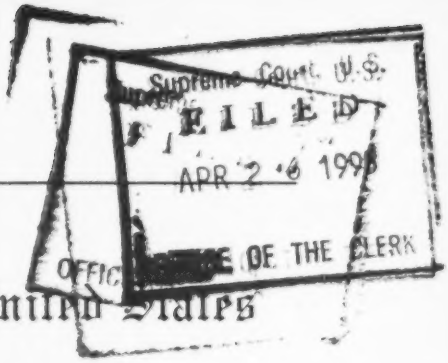
[2] The constitutionality of Judiciary Law § 90 as written is, in addition, an issue that the New York State courts did not address. Petitioner did not present this question in the Appellate Division, but raised it, for the first time, in the Court of Appeals. That court did not pass upon the issue, however, for its *sua sponte* dismissal of petitioner's appeal as of right was on jurisdictional grounds, not on the merits, and its denial of petitioner's subsequent motion for leave to appeal also expressed no view of, and may not be considered a decision on, the merits. *See State Communities Aid Association v. Regan*, 69 N.Y.2d 821 (1987). Accordingly, petitioner's failure properly to raise the issue in the New York courts provides an additional basis for rejecting the petition for a writ of certiorari to the extent that it seeks to review the facial constitutionality of Judiciary Law § 90. *Yee v. City of Escondido, Cal.*, 112 S. Ct. 1522, 1531 (1992).

No. 94-1546



In the

Supreme Court of the United States

October Term 1994

In the Matter of DORIS L. SASSOWER,

Petitioner,

-against-

HON. GUY MANGANO, as Presiding Justice of the Appellate Division, Second Dept., HON. MAX GALFUNT, as Special Referee, and EDWARD SUMBER and GARY CASELLA, as Chairman and Chief Counsel, respectively, of the Grievance Committee for the Ninth Judicial District,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of the State of New York
Appellate Division, Second Judicial Department

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In the
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Respondents.

Petition for a Writ of Certiorari to the
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Appellate Division, Second Judicial Department

PETITIONER'S REPLY MEMORANDUM

THIS COURT HAS JURISDICTION TO REVIEW

Respondents, by the Attorney General of the State of New York, in their Opposing Memorandum [Opp. Memo], do not deny that the "Questions Presented" relating to the constitutionality of New York's attorney disciplinary law, *as written and as applied*, involve serious and substantial deprivations of constitutionally-guaranteed federal rights, wholly unredressed by the state courts.

Nonetheless, the Attorney General argues against review by this Court on the bald claim that the Judgment rests "exclusively on an adequate and independent state ground unrelated to the constitutional question" [Opp. Memo, p. 2].

He further argues, in a footnote, that the *facial* unconstitutionality of Judiciary Law §90 is not properly before this Court because it was raised only in the New York Court of Appeals, which "did not pass upon the issue" when it dismissed Petitioner's appeal as of right and, thereafter, when it denied her motion for leave to appeal. Such decisions, according to the Attorney General, are "not on the merits". [Opp. Memo, fn.2].

As hereinafter demonstrated, neither objection is valid, and this Court's review is essential to prevent evasion by the New York state courts of their duty to enforce federal constitutional rights.

This Court's review is also vital because Respondents are similarly attempting to bar review of Respondent Second Department's June 14, 1991 order interimly suspending Petitioner [A-24][1] and other orders, including the Judgment herein [A-20], in Petitioner's pending federal action under 42 U.S.C. §1983, *Sassower v. Mangano et al.*, 94 Civ. 4514 (S.D.N.Y. 1994), commenced after all her state remedies were exhausted. In such action, Respondents therein, also represented by New York's Attorney General, have raised a subject matter jurisdiction defense under Rooker-Feldman, arguing that "...the District Court has no power to review state court proceedings. *The only permissible review is by the superior state court and/or the Supreme Court.*"[2] (emphasis added). The uncontroverted record shows that the New York Court of Appeals has, *four times*, refused to grant appellate review of Petitioner's interim suspension [A-36, A-49, A-22, A-23]. Thus, the matter is ripe for review by this Court.

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[1] "A-__" citations herein refer to the Appendix of the Petition for Certiorari.

[2] Respondents' January 17, 1995 Memorandum of Law in Support of their Motion for Judgment on the Pleadings, p. 10.

A. The Record Shows that the Judgment is Procedurally and Substantively Insupportable and that No Adequate and Independent State Ground Sustains It

The Attorney General argues the correctness of the Judgment [A-20], with no reference to the record to support his contention that "the state court decision rests on an adequate and independent state ground" [Opp. Memo, p. 2]. His failure to adduce support from the record reflects the fact that the record does *not* sustain the Judgment in *any* respect.

The Attorney General presents no counter-statement of facts to Petitioner's "Statement of the Case" [cert. pet., pp. 3-13] and does not deny or dispute a single fact presented by Petitioner. Consistent with this Court's Rule 15.1, Petitioner's factual statements are deemed conceded.

Inasmuch as the Attorney General does not dispute Petitioner's factual assertions showing that the "interim" suspension of her license is totally devoid of factual or legal basis and that such suspension and its perpetuation are the result of politically-motivated retaliation against her for exercise of First Amendment rights [cert. pet., pp. 3-6 & fn. 4], this Court is duty-bound to undertake "an independent investigation of the whole record" and not accept the Attorney General's conclusory statements at face value. *Edwards v. State of South Carolina*, 372 U.S. 229, 235 (1963), followed in *Cox v. State of Louisiana*, 379 U.S. 536, 545 & n.8. (1965); *Wood v. State of Georgia*, 370 U.S. 375, 386 & n.11 (1962). *See also, In Re Primus*, 436 U.S. 412, 434 (1978); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

Where, as here, there are claims of bias and a tainted tribunal -- which Respondents have not denied -- the factual record must be examined "completely independently" by this Court so as to permit it to confirm that there is no adequate and independent state ground. *Pickering v. Board of Educ. of Township High School Dist. 205*, 391 U.S. 563, 578 n.2 (1968). On this

record, it is clear that the Judgment in question has no basis in state law.

First, under state law, the justices who rendered the Judgment were mandatorily disqualified[3] from doing so and had no subject matter jurisdiction[4] by the very nature of the common law writs, which are the predecessor to New York's CPLR Article 78 statute [A-13].

Second, the Judgment itself reflects egregious violation of the most fundamental legal standards and is procedurally insupportable under state law. The Attorney General does not dispute the facts showing that his pre-answer dismissal motion under CPLR 3211(a)(7) [A-12], granted by the Judgment [A-20], had to be denied as a matter of state law, Petitioner having pleaded facts showing that Respondents were without jurisdiction and that she had no remedy except by Article 78 [cert. pet., p. 8]. By state law, such facts had to be accepted as true for purposes of the dismissal motion[5]. Instead, Respondent Second Department erroneously granted its attorney's dismissal motion, doing so, moreover, "on the merits" rather than on the pleading by, *sub silentio*, converting Respondents' dismissal motion into a summary judgment motion, *sua sponte*, and without the required statutory notice[6] -- all contrary to state law. Moreover, and further contrary to state law, Petitioner was denied summary judgment in her

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[3] Judiciary Law §14 [A-10], New York's Rules Governing Judicial Conduct, §100.3(c)[A-15]; Code of Judicial Conduct, Canon 3C [A-16].

[4] *Colin v. Appellate Division, First Department*, 3 A.D.2d 682 (2d Dept, 1957) citing *Smith v. Whitney*, 116 U.S. 167 (1886), appeal denied 3 A.D.2d 721 (2d Dept. 1957).

[5] *Burke v. Sugarman*, 35 N.Y.2d 39 (1974); *Council of Teachers v. BOCES*, 63 N.Y.2d 100 (1984).

[6] New York CPLR 3211(c) [A-12].

favor[7], for which she had expressly cross-moved under New York's CPLR 3211(c) [A-12] inasmuch as her allegations were established by evidentiary proof and wholly uncontroverted by any probative evidence of Respondents [cert. pet., pp. 8-10].

Third, under the uncontroverted facts set forth in the cert petition [pp. 3-13], there is no legal authority, state or federal, which would permit the suspension of Petitioner's law license [A-24] and its perpetuation for nearly four years or which would permit disciplinary proceedings against her, where there was no prior probable cause finding that she was "guilty" of some act of professional misconduct.

The Attorney General's failure to refute the applicability of *Matter of Nuey*, 61 N.Y.2d 513 (1984) and *Matter of Russakoff*, 79 N.Y.2d 520 (1992), the latter citing this Court's decision in *Barry v. Barchi*, 443 U.S. 55 (1979), establishes that an Article 78 Judgment in Petitioner's favor had to issue since, by state law, Petitioner was entitled to the *immediate* summary relief which Article 78 proceedings are historically intended to provide.

That as of this date -- *more than a year and a half* since the Judgment dismissing the Article 78 proceeding was rendered [A-20] -- the New York state courts have *still* not afforded Petitioner the *immediate* vacatur relief in the disciplinary proceeding, to which she was constitutionally entitled, confirms that Article 78 was the proper vehicle[8].

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[7] *St. Andrassy v. Mooney*, 262 N.Y. 368 (1933); *Kaltner v. Kaltner*, 268 N.Y. 293 (1935); *Port of New York Authority v. 62 Cortlandt Street Realty Co.*, 18 N.Y.2d 250, cert. denied, 385 U.S. 1006.

[8] Cf., *Matter of Loyal Tire & Auto Center, Inc.* NYLJ, 4/24/95, pp.6-7, col 6M-8T, where the New York Supreme Court granted Article 78 relief to a towing company, whose one year "Letter of authorization", which it found to be a "license", from the New York State Thruway , could not be terminated for cause (even after its expiration date), without a hearing. The Court ruled that such "license" was a sufficient property interest to require a due process hearing under the State

Finally, the Attorney General's claim [at p. 2] that the Judgment is supported by "an adequate and independent state ground" rests on the conclusory assertion in the Judgment that "petitioner's jurisdictional challenge can be addressed in the underlying disciplinary proceeding" [A-20]. Yet, the Attorney General does not controvert the fact that *immediately* following rendition of the Judgment, Petitioner tested the purported remedy in the disciplinary proceeding and it proved to be wholly *non-existent* [cert. pet., "Respondents' Post-Judgment Actions", at pp. 10-11, including transcript excerpts [A-64-86] and Respondent Second Department's peremptory January 28, 1994 order [A-87]].

The Attorney General does not deny such extraordinary facts and documentary evidence demonstrating conclusively the lack of any remedy in the disciplinary proceeding. Nor does he deny that same were presented to the New York Court of Appeals, which, by declining review, erroneously upheld jurisdiction-less proceedings without any state remedy.

B. The Constitutionality of New York's Disciplinary Law, *As Written and As Applied*, is Properly Before This Court

This Court's jurisdiction to address the unconstitutionality of New York's attorney disciplinary law, *as applied*, is conceded by the Attorney General [Opp. Memo, at fn. 2]. With such concession, the *facial* unconstitutionality of Judiciary Law §90 [A-9] and the Appellate Division, Second Department's Rules Governing the Conduct of Attorneys, 22 NYCRR §691.4 et seq. [A-4] lies within this Court's jurisdiction as a "subsidiary question" under Rule 14.1(a) of this Court.

The case of *Yee v. City of Escondido, Cal.*, 112 S.Ct. 1522 (1992), cited by the Attorney General, specifically recognizes

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Administrative Procedure Act, relying on *Hecht v. Monaghan* 307 N.Y. 461 (1954).

that:

> "[a] litigant seeking review in this Court of a claim properly raised in the lower courts...generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.... The petitioner can generally frame the question as broadly or narrowly as he sees fit."

Id. at 1532; *accord, Lebron v. National Railroad Passenger Corp.*, __ U.S. __, 115 S.Ct. 961, 962 (1995).

The constitutionality of New York's attorney disciplinary law, *as applied*, must be looked at broadly, since it is plainly intertwined with the law *as written*. Evaluation of the constitutionality of the order interimly suspending Petitioner's law license [A-24] calls for examination of Judiciary Law §90 [A-9], which, as heretofore recognized by state law, *Matter of Nuey*, *supra*, does not authorize interim suspension orders. Consequently, Judiciary Law §90 makes no provision for appellate review therefrom.

Moreover, in Petitioner's aforementioned §1983 federal action, Respondents contend, citing *Olitt v. Murphy*, 453 F. Supp.354, 359 (S.D.N.Y. 1978), aff'd, 591 F.2d 1331 (2d Cir. 1978), *cert. denied*, 444 U.S. 825 (1979) [9], that: "Even where, as here, the New York Court of Appeals 'dismissed summarily on the ground that no substantial constitutional question was directly involved, the decision was final and was *on the merits*'...so that *res judicata* would apply", Respondents' Motion for Judgment on the Pleadings, p. 22,

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[9] See also cases cited at fn. 24 of *Olitt, supra, e.g., Winters v. Lavine*, 574 F.2d 46, 60-61 (2d Cir. 1978) and *quoting Turco v. Monroe County Bar Ass'n*, 554 F.2d 515, 521, cert. denied, 434 U.S. 834 (1977): "[W]e must assume that the Court of Appeals' denial of an appeal as of right here, as well as of discretion, determined that the constitutional issues specifically raised were insubstantial on the merits."

cited above at fn.2. Hence, Respondents should be estopped by virtue of such inconsistent position from making their fn.2 argument here that the New York Court of Appeals' dismissal of Petitioner's appeal as of right [A-22] and its denial of Petitioner's subsequent motion for leave to appeal [A-23] were "not on the merits".

From the foregoing, this Court clearly has jurisdiction to review the subject Judgment, which is unsupported by adequate and independent state grounds, and the substantial federal questions raised therein being properly before the Court.

CONCLUSION

In light of Respondents' failure to confront the issues presented in the petition for certiorari, a Writ should be granted, the need for review being indisputable and compelling. Indeed, Petitioner respectfully submits that summary reversal and immediate vacatur of her interim suspension is constitutionally mandated.

Dated: April 25, 1995
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